93-623

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

VALLEY FORGE INSURANCE CO.,
Petitioner,

v.

DARLENE STRICKLAND, Mother and Next Friend of TINA STRICKLAND, and DARLENE STRICKLAND, Individually,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's standards for imposition of punitive damages and for review of punitive damages awards—whereby an award is disturbed only if it shocks the conscience—provide sufficiently definite and meaningful constraints on the fact-finder's discretion so as to satisfy the Due Process Clause of the Fourteenth Amendment.

2. Whether the excessive and arbitrary nature of the punitive damages award in this case violated Valley Forge's substantive due process rights.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.1 of the Rules of this Court, petitioner, Valley Forge Insurance Company, states that it is a wholly-owned subsidiary of Continental Casualty Company, which is a wholly-owned subsidiary of CNA Financial Corporation, a publicly traded corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172 (Miss. 1990) 6, 9, 16
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 12, 15
Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985), *aff'd on other grounds*, 486 U.S. 71 (1988) 9, 10
Browning Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 12
Dunn v. State Farm Fire & Casualty Co., 927 F.2d 869 (5th Cir. 1991) 20
Eichenseer v. Reserve Life Ins. Co., 894 F.2d 1414 (5th Cir. 1990) 13
Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) 16, 17
Employers Mutual Casualty Co. v. Tompkins, 490 So. 2d 897 (Miss. 1986) 20
First American Nat'l Bank v. Mitchell, 359 So. 2d 1376 (Miss. 1978) 9
Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) 15
Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991) 15
Harvey Latham Real Estate v. Underwriters at Lloyd's, 574 So. 2d 13 (Miss. 1990) 16
Henry v. First Nat'l Bank, 444 F.2d 1300 (5th Cir. 1971) 20
Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108 (Miss. 1992) 6, 12, 16, 18
Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) 15
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 12
Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521 (Miss. 1987), *cert. denied*, 486 U.S. 1043 (1988) 9, 14
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) ..... *passim*
Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972) 14
Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927) 13

TABLE OF AUTHORITIES—Continued

Page

TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) ..... *passim*

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV 2

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PETITION FOR A WRIT OF CERTIORARI

Valley Forge Insurance Company petitions for a writ of certiorari to review the decision of the Supreme Court of Mississippi.

OPINIONS BELOW

The decision of the Supreme Court of Mississippi (App., *infra*, 1a-15a) is reported at 620 So. 2d 535 (Miss. 1993). The judgment and opinion of the Chancery Court of Jackson County, Mississippi (App., *infra*, 16a-33a) is not reported. The ruling of the Supreme Court of Mississippi on the petition for rehearing (App., *infra*, 34a-35a) is not reported.

JURISDICTION

The decision of the Supreme Court of Mississippi was rendered on May 13, 1993. A petition for rehearing was denied on July 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law. . . .

U.S. Const. amend. XIV.

STATEMENT

Fourteen months after it had made full payment to its insured on a claim, Valley Forge Insurance Company ("Valley Forge") was asked to waive subrogation rights to another insurer's $25,000 liability policy. On counsel's recommendation, Valley Forge commenced a declaratory judgment action concerning whether it or its insured was entitled to the policy proceeds. Before the Chancery Court of Jackson County, Mississippi, this relatively simple dispute over $25,000 transmogrified into an extraordinary, multi-million dollar insurance "bad faith" case, ultimately resulting in an award against Valley Forge of $1,000,000 in punitive damages and injunctive relief, to which the chancery court gave as an alternative the payment of an additional $1,000,000 in punitive damages. Although the punitive damages award was extreme and unprecedented, and although the Mississippi Supreme Court found that the result was reached by 'torturing the choice of law rules," App. *infra*, 7a, and undertaking "corrective measures . . . better left to the legislative branch," App., *infra*, 12a, the Mississippi Supreme Court affirmed the unconditional $1,000,000 punitive damages award.

1. On July 23, 1987, Tina Strickland, a Louisiana minor, suffered severe injuries in an automobile accident

in Mississippi while riding as a passenger in the car of her aunt, Vergie Aull, a Mississippi resident. TR26-28.[1] Tina's parents contacted a Louisiana lawyer to pursue insurance claims, including a claim under the binder for automobile liability coverage issued by Valley Forge to Tina's mother, Darlene Strickland. TR29-30. Valley Forge promptly investigated and paid its entire limits of uninsured motorist ($50,000) and medical payments ($5,000) coverage on October 9, 1987, approximately one month after it had received notice of the claim. TR94. Neither Valley Forge, Tina's father as her tutor under Louisiana law, nor Tina's lawyer sought court approval for the payment. TR 55; TR71.

The Stricklands also contacted Vergie Aull's automobile insurer, Nationwide Insurance Company ("Nationwide"), seeking to collect the $25,000 in liability limits. R832. A suit filed in June, 1988, in Louisiana state court by the Stricklands against Aull, Nationwide, and the other driver in the accident languished and ultimately was dismissed. R816-817. Although Nationwide acknowledged Aull's liability, it refused to make payment to Tina even after it was sued in Louisiana state court. Finally, on November 29, 1988—approximately fourteen months after Valley Forge had paid its limits in full—Nationwide agreed to pay Tina $25,000 on the condition that Valley Forge release any subrogation rights it might have to the Nationwide policy. Trial Ex. 10. Prior to this offer, Valley Forge had never even asserted subrogation rights with respect to the Nationwide policy (although upon paying Tina's claim, Valley Forge did have the Stricklands execute certain forms, including a subrogation receipt, as a matter of routine). TR94; Ex. 35 to Trial Ex. 4.

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[1] The record in the Supreme Court of Mississippi is cited herein as "R". The trial transcript page numbers are referred to as "TR——". Trial exhibits are referred to as "Trial Ex. ——". References to the trial transcript and trial exhibits are not otherwise paginated in the record.

Valley Forge referred the issue raised by Nationwide to outside counsel. R992. Upon counsel's recommendation, Valley Forge filed a declaratory judgment action in the Chancery Court of Jackson County, Mississippi, asking for a declaration as to whether Tina or Valley Forge was entitled to the proceeds of the Nationwide policy. R1-3; TR350.

2. In response to Valley Forge's declaratory judgment complaint, Strickland filed a counterclaim which asserted not only that Tina was entitled to the proceeds of the Nationwide policy, but that Valley Forge's prior $55,000 payment to Tina was a nullity because Valley Forge had failed to obtain court approval of the payment. Strickland further claimed that Valley Forge's acts "prior to and up through the instigation" of the declaratory action were in "bad faith" and in "total disregard of the rights of the minor child," and that Valley Forge had tortiously interfered with Tina's negotiations with Nationwide R22-34.

After a bench trial in which the evidence was directed primarily to Valley Forge's alleged practice of failing to obtain court approval of settlements of claims involving minors,[2] the chancellor ruled for Strickland. He first ordered Valley Forge to repay $55,000. The chancellor also ordered Valley Forge to pay interest at 8% on $25,000 (representing Nationwide's policy limits) from the date Nationwide first indicated it would make payment if Valley Forge would waive subrogation rights. Finally, the chancellor imposed a $2,000,000 punitive

[2] Although the chancellor's judgment included a finding that Valley Forge had a "long-established pattern" of failing to obtain court approval of minors' settlements, App., *infra*, 26a, only a single Valley Forge representative—the claims adjuster who handled the claim—testified at trial. Given her inexperience in handling uninsured motorist claims involving minors, she admitted she erred in failing to secure court approval of Valley Forge's $55,000 payment. TR71.

damages award, $1,000,000 payable immediately and the other $1,000,000 payable if Valley Forge within the prescribed time failed to (1) adopt a written corporate policy, approved in its minutes by its Board of Directors, requiring Valley Forge officers and employees to obtain approval of minors' settlements in Mississippi, which are not by law excused from court approval, (2) conduct training sessions on the issue of minors' settlements and applicable Mississippi law, (3) file with the chancery court and with the Insurance Commissioner of Mississippi evidence that it performed the required corporate acts, and (4) publish an advertisement in three consecutive Sunday editions of nine Mississippi daily newspapers, stating that Valley Forge, a member of the CNA Group of Insurance Companies, "has disclosed through sworn testimony of one of its representatives . . . that it has been the customary practice of C.N.A. companies, not to seek court approval of the settlement of minors' (children's) uninsured underinsured damages, at least in the states of Mississippi and Louisiana. . . ." App., *infra*, 31a.

Valley Forge filed a motion for new trial or in the alternative to alter or amend judgment arguing, among other things, that the punitive damages award violated the United States Constitution's Due Process Clause. R927A. The chancellor denied the motion without opinion. R1014-15.

3. On appeal, the Mississippi Supreme Court affirmed in part and reversed and rendered in part. Specifically, even though the chancery court had emphasized Valley Forge's purported practice of failing to obtain court approval of minors' settlements, the Mississippi Supreme Court reversed the conditional $1,000,000 punitive damages award because it did "not consider the conduct related to the [failure to obtain court approval of the] settlement in Louisiana sufficiently culpable to justify

punitive damages." [3] App., *infra*, 12a-13a. Nevertheless, the Mississippi Supreme Court also found that Valley Forge's subsequent conduct in Mississippi, though not technically "bad faith," involved "gross negligence in filing and maintaining a groundless lawsuit," and permitted the unconditional $1,000,000 punitive damages award to stand. App., *infra*, 9a-10a. In rejecting Valley Forge's argument that the punitive damages award was excessive, the Mississippi Supreme Court stated that:

> The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact, the 1.5% of net worth awarded here is proportionally lower than in other similar cases. *See e.g., Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss. 1990) (5¼ per cent of net worth affirmed). Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias or prejudice on the part of the chancellor.

App., *infra*, 11a. The Mississippi Supreme Court rejected Valley Forge's constitutional challenge to the punitive damages award without analysis, relying on *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108 (Miss. 1992). App., *infra*, 13a.

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[3] Though the conditional $1,000,000 punitive damages award obviously related to Valley Forge's failure to secure court approval of its payment in full to Tina given the alternative injunctive relief, in the portion of the judgment awarding punitive damages the chancellor intertwined references to both Valley Forge's purported historical practice of failing to obtain court approval of minors' settlements and its filing of the declaratory judgment action on subrogation as "the willful and wanton conduct" warranting imposition of punitive damages. App., *infra*, 26a-28a. Contrary to the Mississippi Supreme Court's apparent belief, App., *infra*, 10a, the judgment did not apportion the punitive award between the conduct. *See infra* note 8.

REASONS FOR GRANTING THE PETITION

The decision of the Mississippi Supreme Court in this case denied Valley Forge due process because the procedures which gave rise to the $1,000,000 punitive damages award did not include adequate safeguards satisfying the Fourteenth Amendment, such as those approved by the Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). Moreover, the decision approved an award so excessive in relation to Valley Forge's conduct and the harm caused thereby—different conduct and different harm than upon which the chancery court had based its award, *see infra* p. 20—that it constituted an arbitrary deprivation of property without due process. The Mississippi Supreme Court's decision conflicts with this Court's statements on the appropriate constraints on the fact-finder's discretion in imposing punitive damages. This Court's review is necessary to resolve the conflict and to articulate further the appropriate procedures necessary to ensure that punitive damages awards comport with the Due Process Clause.

1. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, —— U.S. ——, 113 S. Ct. 2711 (1993), make clear that the Due Process Clause of the Fourteenth Amendment imposes limits on punitive damages awards. *Haslip*, 111 S. Ct. 1032, 1043; *TXO*, 113 S. Ct. 2711, 2718 (plurality opinion), 2725 (Kennedy, J., concurring), 2731 (O'Connor, J., dissenting). Although there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable . . . general concerns of reasonableness . . . enter into the constitutional calculus," *Haslip*, 111 S. Ct. at 1043, and dictate that there be "meaningful constraints" on a fact-finder's discretion, *id.* at 1045. The principle enunciated in *Haslip* predictably leads to the question of what constraints are meaningful, or whether a scheme with features other than those approved in *Haslip*

similarly suffices. *See Haslip*, 111 S. Ct. 1032, 1046-47 (Scalia, J., concurring). Those important questions are now raised by this petition: do standards for imposition and appellate review of punitive damages awards that turn not on well-defined, objective criteria as in *Haslip*, but rather merely on whether the fact-finder's or reviewing court's conscience is shocked, provide definite and meaningful constraints on the fact-finder's discretion in awarding punitive damages sufficient to satisfy the Constitution's requirements of due process?

In *Haslip*, the Court emphasized that Alabama's three tiers of procedural safeguards—jury instructions on the nature and purpose of punitive damages, trial court review on the record applying specific criteria, and appellate review, also applying specific criteria—were sufficient to satisfy due process requirements. The "full panoply of Alabama's procedural protections," 111 S. Ct. at 1046, limited the fact finder's discretion and reduced the risk that punitive damages were based on passion or prejudice. Integral to the Court's decision was the appelate review exercised by the Alabama Supreme Court: in determining whether a particular award was excessive, the Alabama Supreme Court undertook a comparative analysis of punitive damages awards, and then applied seven detailed substantive standards aimed at ensuring that the award was reasonable, was not in excess of an amount necessary to accomplish society's goals of punishment and deterrence, and possessed some understandable relationship to the compensatory damages. *Haslip*, 111 S. Ct. at 1045. Importantly, the Court found that appellate review had "real effect" in practice, resulting in reduction of punitive awards. *Id.*

In contrast, no clear standards assist fact-finders in imposing punitive damages in Mississippi. Once punitive damages are deemed appropriate, the fact-finder simply considers the purpose of punitive damages—to punish and deter—in the context of the defendant's net worth,

without further guidance on how to achieve those goals or on other objective factors relevant to the determination of the amount. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985), *aff'd on other grounds*, 486 U.S. 71 (1988); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1190 (Miss. 1990). Because of the vagueness of the "punish and deter" standards, a party's financial position, as the only objectively quantifiable criterion, can take on exaggerated importance. Indeed, in Mississippi, awards have been deemed arbitrary because the defendant's net worth and financial condition were not shown. *See First American Nat'l Bank v. Mitchell*, 359 So. 2d 1376, 1381 (Miss. 1978); *Mutual Life Ins. Co. v. Estate of Wesson*, 517 So. 2d 521, 539 (Miss. 1987) (Anderson, J., dissenting), *cert. denied*, 486 U.S. 1043 (1988) ("[C]onsideration of proportionality [between punitive and actual damages] rather than net worth is error."). This exaggerated importance of the consideration of net worth creates the potential for bias against unsympathetic but wealthy litigants. Introducing the defendant's wealth into the calculus "increase[s] the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO*, 113 S. Ct. at 2723. Courts must recognize this danger, and not permit it to dictate punitive damages awards. *See TXO*, 113 S. Ct. at 2738 (O'Connor, J., dissenting). The Court in *Haslip* took comfort that the fact-finder there was "guided by more than the defendant's net worth," evidence of the defendant's wealth having been excluded at trial. 111 S. Ct. at 1045. Net worth, however, appears to be the only guidepost upon which fact-finders can rely safely in Mississippi.

Because it is difficult to determine whether a standard has been violated when it is not readily discernible what that standard provides, the absence of guidelines and constraints concerning punitive awards are felt acutely at

the appellate level. The Mississippi Supreme Court will disturb a punitive damages award "only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court." App., *infra*, 11a; *Crenshaw*, 483 So. 2d at 278. The Mississippi Supreme Court has never clearly articulated what shocks its conscience; on the contrary the standards governing punitive damages awards being vague, it admits that it "necessarily" has no "hard and fast rules" to determine when a punitive damages award is excessive. App., *infra*, 11a; *Crenshaw*, 483 So. 2d at 278. The best that the court offers is a simple yet circular restatement of the goals of punishment and deterrence in the context of the defendant's net worth, and the obscure comment that it is the "judicial conscience," rather than the actual conscience of the members of the Mississippi Supreme Court, that must be shocked. *Crenshaw*, 483 So. 2d at 278.

Given the overall absence of objective criteria for evaluating punitive awards, the test for excessiveness on appeal under Mississippi law often becomes a simple mathematical inquiry based on the defendant's wealth. In this case, the Mississippi Supreme Court found that its conscience was soothed because the award was only 1.5% of Valley Forge's net worth, proportionately lower than in "similar" cases (without analyzing whether those cases in fact involved comparable torts or comparable harm). App., *infra*, 11a; *see also*, *Crenshaw*, 483 So. 2d at 279 ("[I]t is difficult to imagine that . . . the judicial conscience could be shocked by a punitive damage assessment which is less than 1% of the financial net worth of the defendant."). The implication of these cases is that an award should not be disturbed if it does not exceed a certain level of proportionality to the defendant's net worth, without regard to the specific conduct or harm (and thus the need to "punish and deter") involved in the case.

Like the standards which govern the fact-finder's imposition of punitive damages, Mississippi's appellate review is devoid of specific, objective criteria by which to evaluate punitive damages awards. Simply stating that a particular punitive damages award "shocks the conscience" begs the quesiton of why it does so. *See TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring). To eliminate arbitrariness and unpredictability, specific principled criteria—for example, the award's numerical relation to the compensatory damages, the nature of the existing or potential harm, the nature of the conduct, the profit to the malefactor, the culpability of the defendant, comparable awards in comparable circumstances, legislatively designated penalties, and the like, *see Haslip*, 111 S. Ct. at 1045; *TXO*, 113 S. Ct. at 2719—should guide the fact-finder in imposing the award and the appellate court in reviewing it, and lay the foundation for the ultimate conclusion that an award "shocks the conscience." Without such criteria:

> A reviewing court . . . comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints . . . could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and in doing so, discourage legislative intervention that might prevent unjust awards.

TXO, 113 S. Ct. at 2725 (Kennedy, J., concurring).

That Mississippi's system lacks the dimension of rigorous, objective appellate review has been widely recognized. The Court in *Haslip* observed that Mississippi's system differed significantly from Alabama's scheme; in fact, the seven detailed substantive standards [4] guiding

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[4] The Alabama Supreme Court examines: "(a) whether there is a reasonable relationship between the punitive damages award and

appellate review of punitive awards ". . . distinguishe[d] Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988)." *Haslip*, 111 S. Ct. at 1045, n.10 (parallel citations omitted). Some appellate courts have read the Court's comment in *Haslip* as a direct rejection of the Mississippi and Vermont systems and of other schemes exhibiting the same infirmities. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105 (4th Cir. 1991) (in invalidating South Carolina's scheme for awarding punitive damages, the Fourth Circuit stated, "while the Supreme Court in *Haslip* did not say as much, the inference is left that the broad discretion given juries under the laws of Vermont and Mississippi is not adequately checked by court review based on a standard of excessiveness. The same inference is applicable to the South Carolina scheme. . . ."). Indeed, the Mississippi Supreme Court itself acknowledged that this Court "footnoted its belief that Mississippi's system is—more likely than not—unconstitutional" because, among other things, "a substantive and comparative 'check' is not conducted by the Mississippi Supreme Court." *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108, 1116 (Miss. 1992).

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the harm likely to result from the defendant's conduct as well as the harm that has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." *Haslip*, 111 S. Ct. at 1045.

Appellate review of punitive awards is the last and perhaps the best means of "discern[ing] impermissible influences and guarantee[ing] constitutional results." *TXO*, 113 S. Ct. at 2742 (O'Connor, J., dissenting). Where the punitive damages are imposed by the judge, as was the case here, the need for rigorous appellate review is even more acute as it is the sole opportunity for the award to be evaluated by someone other than the fact-finder who imposed it. While judges ordinarily are thought better able to detect "impermissible influences" than juries, they too are not immune from bias and prejudice. *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*, 147 Miss. 186, 113 So. 433, 440 (1927) (Ethridge, J., dissenting) ("A chancellor, of course, is like other men, subject to the same imperfections that every man is subject to. He has his prejudices and is unable to rise above them completely, and these prejudices will evidently be felt and seen in the decree, although he is unconscious thereof."). For the reviewing court simply to contemplate the award in light of the malleable goals of punitive damages and in the context of the defendant's net worth provides no meaningful constraint on fact-finder discretion at perhaps the most critical procedural juncture; it effectively permits a court to "disregard the post-trial review required by due process at whim or will so long as [it does] not deny its necessity openly or altogether." *TXO*, 113 S. Ct. at 2742 (O'Connor, J., dissenting).

In application, decisions of the Mississippi Supreme Court demonstrate its failure to evaluate punitive awards without meaningful inquiry based on identifiable criteria and its willingness to ratify the fact-finder's decision without inquiry. The operative factor in Mississippi's scheme of appellate review is complete deference to the fact-finder. *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1417 (5th Cir. 1990) (Jones, J., *dissenting from denial of petition for reh'g en banc*), *cert. granted and judgment vacated*, 111 S. Ct. 1298 (1991) ("Mis-

sissippi courts all but refuse to interfere with the amounts of punitive damages assessed by the fact finder."). There has been only a single instance where the Mississippi Supreme Court reduced a significant punitive damages award because it was so excessive as to "shock the conscience," *Estate of Wesson*, 517 So. 2d at 533, and even then, the court did not elaborate on the basis for its reduction.[5] Unlike the Alabama Supreme Court's review approved in *Haslip*, appellate review in Mississippi has no "real effect" in practice.

This case vividly illustrates the flaws of Mississippi's system. Based on the testimony of a single adjuster, the chancellor made far-reaching findings concerning Valley Forge's alleged pattern and practice of failing to obtain court approval of settlements of minors' claims[6] and concerning Valley Forge's state of mind. On the basis of these conclusions, the chancellor then fashioned relief, including punitive damages, designed to make a public proclamation on the importance of court approval of settlements with minors and to achieve goals "better left to the legislative branch." App., *infra*, 12a. Nothing constrained the fact-finder's discretion to fashion such relief at the trial court level. The full panoply of procedural protections in this case consisted solely of a cursory review by the Mississippi Supreme Court under a deferential standard for excessiveness. Applying a mathematical formula, it declared that its judicial conscience was not shocked. Overly deferential review of the fact-finder's decision—one which rejects the award only if it shocks the

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[5] Punitive damages awards have been reduced or invalidated in Mississippi based on improper fact-finding at the trial level. *See Snowden v. Osborne*, 269 So. 2d 858, 861 (Miss. 1972). This is not the same as finding that the punitive damages award is so excessive as to shock the conscience.

[6] As discussed, *infra* p. 20, the Mississippi Supreme Court deemed Valley Forge's failure to obtain court approval of its payment to Tina Strickland an "oversight." App., *infra* 6a.

conscience without reference to fixed, objective criteria—is too elastic a restraint to provide meaningful protection against punitive damages awards that are the product of bias, passion, or prejudice or are otherwise without reasonable basis.

After *Haslip*, states began modifying their schemes of awarding punitive damages to comport with the Court's ruling. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417 (4th Cir. 1992) (*en banc*). For example, West Virginia dropped its deferential appellate review standard pursuant to which punitive damages awards were overturned only if they were the subject to "passion or prejudice" or were so excessive as to "shock the conscience." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 908 (1991). Other states chose to adopt the standards approved in *Haslip*. *See, e.g., Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350, 354 (1991).

Despite the due process concerns about Mississippi's punitive damages scheme noted by this Court, *see Haslip*, 111 S. Ct. at 1045, n.10, and *Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring), Mississippi has not revisited its common-law scheme for awarding punitive damages. This is somewhat surprising because even before *Haslip*, the Mississippi Supreme Court itself recognized that:

> It is imperative that some parameters be developed for the guidance of juries and courts fixing the amount of punitive damages. The present undefined and open-ended status breeds disrespect for the law and for the courts and cannot be defended in reasoned debate. Standards need to be developed which will result in reasonable similar consequences, given reasonably similar circumstances. This objective has not been seriously addressed by this Court, and by few in the nation. It is a legitimate judicial undertaking, and should be accomplished by finding a just resolution of the several cases that come before us,

> one at a time. When enough cases have been decided the rules shall have emerged.

Harvey-Latham Real Estate v. Underwriters at Lloyd's, 574 So. 2d 13, 17 (Miss. 1990).

Harvey-Latham held out the promise that the Mississippi Supreme Court would develop standards to guide fact-finders and to guide itself in its appellate review of punitive damages awards; that promise has proved to be a false one. *Cf. TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting). Relying on *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108 (Miss. 1992), the Mississippi Supreme Court in this case concluded without analysis that Mississippi's existing procedures for awarding punitive damages are not unconstitutional. App., *infra*, 13a.

In *Ivy*, the Mississippi Supreme Court summarily rejected all constitutional challenges to its punitive damages scheme by relying on a pre-*Haslip* decision, *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss. 1990), which purportedly "meticulously explained that the judge or jury's discretion *is* limited or confined" and that the Mississippi Supreme Court indeed "provided a substantive and comparative 'check' on the amount which the jury awarded the plaintiff." 612 So. 2d at 1116.[7] The holding of *Ivy*, however, itself underscores the failings of Mississippi's scheme for punitive damages: one panel of the Mississippi Supreme Court, in *Harvey-Latham* (decided after *Andrew Jackson*), believes standards limiting punitive damages are lacking, while another panel, in *Ivy* (relying on *Andrew Jackson*) believes the standards in Mississippi, including appellate review, adequately constrain fact-finder discretion.

In *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991), after the United States Supreme Court

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[7] *Andrew Jackson* could not have provided guidance to the chancellor in this case because the judgment pre-dated that decision.

granted certiorari and remanded the case in light of *Haslip*, the Fifth Circuit critically analyzed Mississippi's scheme for awarding punitive damages, rejecting a constitutional challenge based on due process grounds. Finding that *Haslip* required analyzing whether the award is reasonable in light of the circumstances of the case and whether the procedures used in assessing the award imposed a sufficiently definite constraint, the Fifth Circuit approved a $500,000 punitive damages award primarily because the District Court Judge exhaustively examined the deterrent and retributive effects of the award, and applied many of the objective "substantive standards" that this Court approved in its review of the Alabama procedures in *Haslip*. 934 F.2d at 1386. *Eichenseer*, however, did not give blanket approval to Mississippi procedures. Indeed, the court expressly stated that there might be cases where Mississippi's vague guidelines and deferential standard of review would not act as an adequate check on the discretion of the fact-finder. *Id.*

This is such a case. Here, the only procedural safeguard to ensure that the punitive damages award was not an impulsive reaction to Valley Forge's net worth was the Mississippi Supreme Court's review. The chancellor made no detailed, substantive findings on the record premised on objective criteria. On the contrary, he simply catalogued Valley Forge's wrongs,[8] invoked the talismanic

[8] The Supreme Court of Mississippi found that the chancellor improperly deemed one aspect of Valley Forge's conduct worthy of punitive damages. It nevertheless decided to apportion the punitive damages, determining that "the chancellor awarded $1,000,000 in punitive damages unconditionally based on Valley Forge's assertion of subrogation rights and another contingent $1,000,000 based on the failure to obtain court approval for the Louisiana settlement." App., *infra*, 10a. There is no support for this position in the judgment. The punitive award, as the Mississippi Supreme Court concedes elsewhere in its decision, App., *infra*, 6a, was the product of Valley Forge's conduct in its entirety. It is troubling that the Mississippi Supreme Court engaged in its own fact-finding, allocated the punitive damages among the alleged wrongs, found

phrase "punish and deter," examined net worth, and imposed punitive damages (together with unprecedented conditional injunctive relief, *supra* p. 5). Without any sort of constraint or review at the trial court level, the Mississippi Supreme Court became the first, last, and only check on the discretion of the fact-finder.

The confusion flowing from Mississippi's amorphous standards governing imposition and review of punitive damages awards shows that Mississippi's scheme, unlike the Alabama system approved in *Haslip*, does not have meaningful constraints on the fact finder's discretion. The apparent tension between the Mississippi Supreme Court's view of the constitutionality of its punitive damages scheme in this case and in *Ivy*, as contrasted with the Court's comments and holding in *Haslip*, accentuates the necessity of review to clarify the appropriate limits on punitive damages awards required by the Constitution's Due Process Clause.

2. The $1,000,000 punitive damages award is so excessive in relation to Valley Forge's conduct and the harm caused thereby that it violates the substantive component of the Due Process Clause. *TXO* makes clear that the Fourteenth Amendment imposes substantive limits on the amount of punitive damages awards. 113 S. Ct. at 2719 (plurality opinion), 2725 (Kennedy, J., concurring), 2731 (O'Connor, J., dissenting). In rejecting a substantive due process challenge to a $10,000,000 punitive damages award based primarily on the wide ratio (526:1) between punitive and actual damages, the plurality of the Court in *TXO* held that the disparity between the amounts did not control in a case of that character. 113 S. Ct. at 2722. Specifically, though the difference between the $10,000,000 punitive damages and the $19,000 com-

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that the purported wrongs which formed the primary basis for the chancery court's punitive damages award were not "sufficiently culpable to justify punitive damages," App., *infra*, 13a, but left the $1,000,000 award intact.

pensatory damages was indeed "dramatic," the plurality looked to the magnitude of the potential harm or loss that would have occurred had the petitioner prevailed in the dispute, which, when considered, significantly reduced the ratio and dissipated the "shocking disparity." *Id.*

In addition, there was also evidence in the record establishing that TXO, rather than engaging in an isolated incident, acted out a malicious and fraudulent course of conduct involving slander of title which was part of a "larger pattern of fraud, trickery and deceit." 113 S. Ct. at 2722. This element of malice persuaded the plurality that the punitive damages in *TXO* were not so grossly excessive as to violate due process. 113 S. Ct. at 2722-23. Indeed, Justice Kennedy found that the "ample evidence" of malice made it "probable that the jury's verdict was motivated by a legitimate concern for punishing and deterring TXO, rather than by bias, passion, or prejudice." 113 S. Ct. 2726.

Although Valley Forge also faces a punitive award far disproportionate to the economic harm caused, Valley Forge's conduct was not malicious and there was proof at trial neither of catastrophic potential harm which could have resulted from Valley Forge's conduct in this particular case nor of similar conduct by Valley Forge in other cases showing a deliberate pattern and practice of wrongful conduct.

Implementing Mississippi's public policy of protecting minors, the chancellor found Valley Forge acted in bad faith by engaging in a practice of failing to obtain court approval of minors' claims, and by filing a frivolous subrogation suit, App., *infra*, 26a-28a. The chancellor stated that Valley Forge's conduct, in its totality, "easily meets the standard for imposition of punitive damages," and awarded $1,000,000 in unconditional punitive damages. App., *infra*, 28a-29a. The Mississippi Supreme Court, however, found that Valley Forge's failure to obtain court approval of the settlement of Tina Strickland's claim was

merely an "oversight" and was not in "callous disregard to the rights of another." App., *infra*, 6a. The court did not consider the evidence of any pattern and practice of Valley Forge with respect to the settlement of minors' claims. Rather, the court based its affirmance of the entire $1,000,000 punitive damages award by the chancery court on the filing of the declaratory action in this particular case. The Mississippi Supreme Court concluded that Valley Forge's filing of the declaratory judgment action was not technically "bad faith" as found by the chancellor, App., *infra*, 10a, but involved "gross negligence in filing and maintaining a groundless lawsuit," App., *infra*, 9a, a cause of action heretofore not recognized in Mississippi.[9] Thus, a punitive damages award originally based on the chancellor's finding that Valley Forge had engaged in a bad faith pattern and practice of avoiding court review of settlements with minors, calculated to allow Valley Forge to violate the rights of minors repeatedly in some undetermined number of settlements in at least two states, was affirmed on the basis that Valley Forge had acted negligently in taking an unsound legal position in one case involving $25,000. This case plainly does not involve the sort of culpable conduct, *TXO*, 113 S. Ct. at 2726 (Kennedy, J., concurring), exposure to potential harm in this case, *TXO*, 113 S. Ct.

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[9] The only recognized cause of action in Mississippi relating to improper filing of a lawsuit is the intentional tort of malicious prosecution, which requires a finding of malice. *See Henry v. First Nat'l Bank of Clarksdale*, 444 F.2d 1300, 1310 (5th Cir. 1971). Indeed, Valley Forge had no notice that the filing of a declaratory aciton would give rise to a punitive damages award, as Mississippi precedent had recognized that filing a declaratory complaint to resolve a legal issue is an act of good faith, not bad faith, even if the issue is resolved against the insurer. *See Employers Mutual Casualty Co. v. Tompkins*, 490 So. 2d 897, 905 (Miss. 1986); *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 874 (5th Cir. 1991) ("For requiring the resolution of the legal issue [the insurer] cannot be liable under Mississippi law for punitive damages even if it does not prevail on the underlying legal issue.").

at 2722, or showing of a pattern of wrongful conduct, *id.*, that could justify an award of punitive damages so grossly disproportionate to the actual damages in this case.

Indeed, neither the chancellor nor the Mississippi Supreme Court in this case articulated the precise harm caused by Valley Forge's filing of a meritless declaratory judgment action. While the chancellor dwelled on the potential harm of failing to get court approval of a settlement, App., *infra*, 26a-27a, that was not relevant to the Mississippi Supreme Court's decision. The Mississippi Supreme Court only noted briefly in passing that the filing of the suit resulted in Tina Strickland losing the use of needed funds such that Tina "unquestionably suffer[ed] serious damages," but did not state what those damages were. App., *infra*, 9a. The amounts awarded in actual damages below do not reflect "serious damages" which could justify a $1,000,000 punitive damages award. At most, the only harm to Tina Strickland caused by Valley Forge's decision to file a declaratory judgment action was the delay in receiving the $25,000 policy proceeds and the attorneys' fees incurred in the litigation. The chancellor awarded interest on the $25,000 limits, which amounts to less than $4,000, and $30,000 in attorneys' fees. This total bears no rational relationship to the $1,000,000 punitive damages award.

The Mississippi Supreme Court affirmed the entire $1,000,000 unconditional punitive damages award of the chancery court despite the change in the basis of Valley Forge's liability from "bad faith" to "negligence," and the change in the conduct on which the award was based from a calculated, bad faith, multi-state course of conduct affecting multiple victims to conduct in connection with one $25,000 case. When the same punitive damages award is appropriate regardless of the conduct or cause of action giving rise to it, or the harm caused thereby, it is necessarily a product of a scheme that both lacks procedures to ensure fair results and encourages arbitrary and

unpredictable deprivations of property. This is therefore a compelling case for this Court to further articulate the appropriate procedural and substantive limitations the Due Process Clause imposes on punitive damages.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 20, 1993

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 90-CA-0933

VALLEY FORGE INSURANCE COMPANY/CNA INSURANCE COMPANY

v.

DARLENE STRICKLAND, mother and next friend of TINA STRICKLAND, and DARLENE STRICKLAND, individually,

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May 13, 1993

Rehearing Denied July 22, 1993

Dorrance Aultman, Aultman Tyner McNeese & Ruffin, Hattiesburg, Theodore A. Boundas, Robert L. Suomala, Peterson & Ross, Chicago, IL, for appellant.

T. Patrick Welch, McComb, Jim Kitchens, Connie Johnson, Kitchens & Ellis, Jackson, T. Patrick Welch, McComb, for appellee.

Before DAN M. LEE, P.J., and SULLIVAN and BANKS, JJ.

DAN M. LEE, Presiding Justice, for the Court:

This case originated when Valley Forge filed a complaint seeking a declaration that it was entitled to the proceeds ($25,000) under an insurance contract between

Nationwide Insurance and Vergie Aull. Valley Forge based its claim on the subrogation rights afforded by Mississippi Code Annotated §§ 83-11-103 and 83-11-107. By way of counterclaim, Darlene Strickland sought, on behalf of her daughter, the $25,000 payment representing the limit of Aull's automobile liability policy with Nationwide. She also asserted a claim for a second payment of the policy limits of her insurance binder with Valley Forge because the first payment to her minor daughter was not court approved. Strickland additionally alleged tortious interference with settlement negotiations on the part of Valley Forge and "bad faith."

The chancellor ruled that Strickland was entitled to the $25,000 benefit under the Nationwide policy. He further ruled that Valley Forge must again tender its policy limits of $55,000 due to its failure to obtain court approval. Finally, he found against Valley Forge on the bad faith claim and unconditionally awarded the Stricklands $1,000,000 in punitive damages. The judgment also called for an additional $1,000,000 award payable only if Valley Forge failed to satisfy certain corrective and preventive measures described in the judgment and discussed below.

Valley Forge properly appealed the adverse ruling below, asserting the following as assignments of error:

I. The Chancery Court erred in refusing to apply Louisiana law to the counterclaim for punitive damages.

II. The Chancery Court erred in holding that Valley Forge acted in bad faith and in imposing punitive damages.

III. The Chancery Court awarded excessive punitive damages.

IV. The Chancery Court erred in awarding conditional punitive damages.

V. The punitive damages award against Valley Forge violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution.

VI. The Chancery Court erred in denying Valley Forge a jury trial on the counterclaim for bad faith.

VII. The Chancery Court erred in the calculation of damages, attorney's fees, and interest.

STATEMENT OF THE FACTS

On June 9, 1987, Darlene Strickland, a resident of Tangipahoa Parish, Louisiana, applied for an automobile liability policy from Valley Forge. The parties agreed to a temporary binder pending further review of the application. Although no policy was ever issued, the binder was in effect on July 23, 1987, the date of the automobile accident that ultimately gave rise to this suit. The binder provided for uninsured motorist coverage of $50,000 and medical payments coverage of $5,000.

On the day of the accident, Strickland's twelve year old daughter, Tina, was a passenger in an automobile being driven in Jackson County, Mississippi, by her father's sister, Vergie Aull, a Mississippi resident. As a result of a collision with a van, Tina suffered severe injuries, including brain damage. These injuries initially required a lengthy hospital stay and costly rehabilitation. Tina will continue to require extensive medical care.

During the early stages of Tina's recovery in a Mississippi hospital, her parents hired Robert Carter, a Louisiana attorney, to pursue Tina's legal claims. Carter began corresponding with the CNA insurance group. The CNA group is a collection of independent insurance companies that are associated for certain purposes. Valley Forge is a member of the CNA group. Carter made con-

tact with Diane Nelson, a claims specialist in Valley Forge's Metairie, Louisiana, office.

After an initial investigation, Nelson requested authority to pay the policy limits, $55,000. During the investigation Nelson learned that Nationwide accepted Aull's liability and hoped to settle for the $25,000 limit on Aull's policy. She also obtained information that allowed her to estimate that Tina's damages exceeded $200,000.

After receiving approval from her supervisors, Nelson mailed a draft for $55,000 to the Stricklands, payable to the order of "Alvin Denman Strickland & Margaret Darlene Strickland, as Parents/Guardian of Tina Strickland, A Minor, and their Attorney Robert J. Carter." Included with the check was a "Receipt for Payment," a "Subrogation Receipt," and a note to Carter asking him to have his clients execute the documents prior to the release of the funds. The Stricklands executed the documents and received the balance after Carter deducted a fee of $12,146. No court ever approved the settlement or supervised the disbursement of the funds.

After obtaining the $55,000 from Valley Forge, the Stricklands, through their attorney Carter, continued to seek recovery from Aull's automobile liability insurer, Nationwide. In June 1988, the Stricklands filed suit in Louisiana against Aull, her husband, the driver of the van involved in the accident, and Nationwide. During the pendency of this action, Carter was apparently terminated and the Stricklands employed their current lawyers. The Louisiana suit was not prosecuted further.

Nationwide indicated a willingness to pay the full limits of the policy held by Mrs. Aull to the Stricklands. However, Nationwide was unwilling to do so unless Valley Forge waived whatever subrogation rights it held in connection with Valley Forge's payment to the Stricklands. (Either by virtue of Mississippi statutory law or the document titled "Subrogation Receipt" which purported to

transfer to Valley Forge all of Tina's claims against third parties.) Valley Forge refused to waive, thereby creating an impasse. Eventually, Valley Forge filed a declaratory judgment action in a Mississippi court to determine the validity of its subrogation claim. The original plaintiff was CNA but Valley Forge was later substituted as the real party in interest by an agreed order. The Stricklands filed an answer denying the validity of the subrogation claim and counterclaim alleging that the $55,000 payment was a nullity for lack of court approval and further alleging tortious interference and "bad faith" on the part of Valley Forge.

SUMMARY OF THE CHANCELLOR'S JUDGMENT

The significant portions of the lower court's judgment and opinion are summarized below, largely in the chancellor's own words.

1. Is Valley Forge entitled to subrogation or offset?

No. Under Louisiana law and their own policy provisions, Valley Forge is not entitled to subrogation or offset. Tina is entitled to the $25,000.

2. Has there been a valid settlement of Tina's claim under Louisiana law?

No. Since no court approval was obtained for the $55,000 payment by Valley Forge, there has been no settlement, the subrogation agreement is void, and Tina is entitled to receive a court-approved settlement of $55,000 from Valley Forge.

3. Is Valley Forge liable to Tina for interest on the Nationwide $25,000?

Yes. Valley Forge is liable for interest at 8% per annum from November 29, 1988 (the date the court found that payment was offered) until the date such sum was (or is) paid.

4. Is Tina entitled to recover punitive damages from Valley Forge?

Yes. Valley Forge by filing this suit, as well as by refusing to acknowledge it had no subrogation rights, wrongfully interfered with Tina's recovery of the $25,000. The chancellor awarded the Stricklands $1,000,000 unconditionally and another $1,000,000 should Valley Forge fail to comply with certain corrective requirements set out at length in the chancellor's opinion.

I. The Chancery Court erred in refusing to apply Louisiana law to the counterclaim for punitive damages.

The chancellor applied Mississippi law to the counterclaim, relying on the public policy exception to our normal "most significant relationship" choice of law rule. The protection of minors was the policy concern that was purportedly offended by application of Louisiana law. Valley Forge disputes the applicability of the public policy exception, and asserts that Louisiana law should apply to the counterclaim. Apparently Louisiana law would not provide for punitive damages in this case.

After careful consideration of the record, we conclude that there was no requirement that the lower court choose between Mississippi and Louisiana law for purposes of assessing punitive damages. The law applicable to the underlying tort is also applicable on the issue of punitive damages. *Restatement (Second) of Conflicts of Law § 171.* The chancellor based his award of punitive damages on Valley Forge's assertions of subrogation rights and its failure to obtain court approval of the original settlement payment. We are of the opinion that only the assertion of the subrogation right rises to the level of tortious conduct. While the failure to obtain court approval of the initial payment was an oversight, requiring a second, court supervised payment, it cannot be said to have been in callous disregard to the rights of another. Con-

sequently, it cannot support an award of punitive damages.

As for the assertion of subrogation rights under Mississippi statutory law, the chancellor correctly found that this conduct occurred in Mississippi. As he stated in his opinion:

> Valley Forge considered Tina's claim worth more than $205,000. Valley Forge knew, or should have known, that the subrogation agreement signed for Valley Forge by the Stricklands was void, or at least subordinate to Tina's being made whole. Valley Forge knew Louisiana law did not permit subrogation or offset until after the insured is made whole. Valley Forge knew it did not obtain court approval of the settlement of Tina's claim. Valley Forge knew Tina was seeking recovery of the $25,000 from Aull-Nationwide, and $10,000 from Cromwell-Automotive. Armed with all this information, Valley Forge's subrogation/offset contention is without merit and frivolous. Armed with such information, *Valley Forge has engaged in a bad faith effort to assert in Mississippi a contention Valley Forge knows it cannot successfully assert in Louisiana, the state where the contract was made.*

(emphasis added).

We will address whether this conduct warrants punitive damages below. For now it is important to note that the only tortious conduct to be found in the record occurred in Mississippi. It follows, *a fortiori*, that the only law to consider in assessing punitive damages is Mississippi law. The conflict of punitive damages law perceived by the chancellor was a false one. However, he cured his mistake by torturing the choice of law rules to yield the same result. Where a lower court reaches the proper result, albeit through no fault of its own, we will not reverse. *See Monroe County Bd. of Educ. v.*

Rye, 521 So.2d 900 (Miss. 1988). Thus, this assignment of error is without merit.

II. The Chancery Court erred in holding that Valley Forge acted in bad faith and in imposing punitive damages.

The chancellor held that Valley Forge's assertion of a subrogation right in Mississippi was an act of "bad faith" that wrongfully interfered with Tina's settlement negotiations with Nationwide. On appeal, Valley Forge asserts that its actions were justifiable and that Nationwide was merely seeking an excuse to withhold payment. Valley Forge argues that it never considered subrogation until Nationwide demanded a waiver of such claims. Then, on the advice of outside counsel, Valley Forge came to believe that a Mississippi court might apply this State's statute allowing subrogation even though that statute is at odds with both Louisiana law and the provisions of the policy that would have issued to the Stricklands. Valley Forge cites a case wherein this Court refused to allow a claim under the Louisiana Direct Action statute because to do so would conflict with Mississippi public policy. *See McNeal v. Administrator of Estate of McNeal*, 254 So.2d 521, 524 (Miss. 1971).

According to Valley Forge, the declaratory judgment action was filed to settle this "question" of Mississippi law, in order to expedite payment to the proper party and not to hold up or interfere with Tina's recovery. Valley Forge relies on *Employers' Mutual Casualty Co. v. Tompkins*, 490 So.2d 897 (Miss. 1986) where this Court held that filing a complaint to resolve a legal issue is not to be considered bad faith merely because the issue is ultimately resolved against the insurer.

The same conduct may give rise to an action for breach of contract as well as an action in tort. Under the facts of this case, any action for breach, including

punitive damages for bad faith breach, would of course be subject to Louisiana contract law. However, if Valley Forge's actions in Mississippi also constitute an intentional tort of negligence, then Mississippi tort law, including the rules related to punitive damages would control. Beyond this choice of law issue, however, the distinction between tort and contract actions is largely academic. Either may provide a basis for imposition of punitive damages under proper circumstances. The chancellor in his written opinion labelled Valley Forge's conduct a "bad faith effort" to assert a meritless contention in the courts of Mississippi, implying a breach of the implied contractual covenant of good faith and fair dealing. We consider it to more properly involve gross negligence in filing and maintaining a groundless lawsuit, to the detriment of the Tina Strickland.

The standard for punitive damages is the same under either approach. "A plaintiff is entitled to punitive damages only if he has demonstrated a willful or malicious wrong or the gross, reckless disregard for the rights of others." *Strickland v. Rossini,* 589 So.2d 1268 (Miss. 1991).

On the facts of this case, we have no difficulty concluding that Valley Forge acted negligently. By virtue of its relationship with Tina Strickland, it owed her a duty not to interfere with her recovery of amounts due to her. This duty transcends the contract between Valley Forge and Darlene Strickland. Valley Forge breached this duty by asserting a meritless subrogation claim. As a result Tina lost the use of desperately needed funds, unquestionably suffering serious damages. As for punitive damages we agree that the conduct demonstrated a callous and reckless disregard for the rights of Tina Strickland. To borrow an analogous concept from contract cases, Valley Forge had no "arguable basis" for its position. The claim that a Mississippi court would apply Mississippi statutory law is patently untenable,

given the policy provisions. Even a Mississippi insurance contract could contain effective clauses subordinating an insurer's subrogation claim to the insured's interest in full recovery, statutory offset rights notwithstanding.

Thus although not technically "bad faith" as that term is used in breach of contract cases, Valley Forge's conduct was sufficiently egregious to justify punitive damages. Accordingly, this assignment of error is without merit.

III. The Chancery Court awarded excessive punitive damages.

The chancellor awarded $1,000,000 in punitive damages unconditionally based on Valley Forge's assertion of subrogation rights and another contingent $1,000,000 based on the failure to obtain court approval for the Louisiana settlement. We affirm the unconditional award under this heading and address the contingent award below.

Valley Forge's argument on this issue consists of two assertions that punitive damages in any amount are improper. First the company denies any malice or recklessness. According to Valley Forge, the Stricklands' insurance claim was handled promptly and fairly, with coverage acknowledged and limits paid one month after notification of the claim. Thus, in Valley Forge's estimation, there was no evidence on an intent to cause harm.

Next Valley Forge denied any actual damage and cited precedent to the effect that, "an award of punitive damages must be supported by the existence of actual damages." *See Defenbaugh and Co. v. Rogers*, 543 So.2d 1164, 1167 (Miss. 1989). The company claims that Tina suffered no actual harm as a result of its conduct. According to Valley Forge, the Chancery Court did not articulate how, and in what amount, Tina had been actually harmed.

No hard and fast rule exists for establishing the maximum amount of punitive damages awardable in any given case. *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172 (Miss. 1990); *Bankers Life and Cas. Co. v. Crenshaw,* 483 So.2d 254 (Miss. 1985). Instead, the amount must be considered in light of several factors. First, the amount awarded should serve to punish the insurer and to deter it from committing similar offenses in the future. Second, the amount should serve as an example set to deter others from committing similar offenses. Third the amount awarded should account for the insurer's pecuniary ability and financial worth. And fourth, the amount constitutes compensation for the plaintiff for his or her "public service" in bringing the action. *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172 (Miss. 1990).

On appeal, an award will be disturbed only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court. *Williams,* 566 So.2d at 1190; *Crenshaw,* 483 So.2d at 278.

The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases. *See e.g., Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172 (Miss. 1990) (5¼ per cent of net worth affirmed). Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias, or prejudice on the part of the chancellor. Accordingly, this assignment of error is without merit.

IV. The Chancery Court erred in awarding improper relief.

Valley Forge argues that the non-monetary relief granted by the chancellor violates important legal prin-

ciples by going beyond what is necessary to decide the pending case and by disregarding the cautious approach to punitive damages advocated by this Court.

There are two rules applicable to this issue. First, chancellors have only those remedial powers necessary to a particular case:

> The remedial powers of our chancellors are sufficient to vindicate the claims and interests of all litigants. Those powers are as broad as equity and justice require. Those powers have always been marked by flexibility and expansiveness so that appropriate remedies may be decreed to satisfy the needs of the particular case. The chancellor's remedial powers are marked by plasticity. Equity jurisdiction permits innovation that justice may be done. That there is no precedent for the exact relief sought is of no consequence.
>
> Courts of equity have all remedial powers *necessary to the particular case*, except those that are expressly forbidden by law.

Hall v. Wood, 443 So.2d 834, 842-43 (Miss 1983) (emphasis added).

The second general rule is that punitive damages in Chancery Court are not favored and are to be allowed only with caution and within narrow limits. *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454 (Miss. 1983) (footnote 1); *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239 (Miss. 1977).

Obviously the corrective measures fashioned by the chancellor were not intended to be of any direct benefit to the plaintiff in this case. Although his intentions were laudable, matters of such general and far reaching import are better left to the legislative branch. Courts have only the more narrow duty to interpret the law. Furthermore, we do not consider the conduct related to the set-

tlement in Louisiana sufficiently culpable to justify punitive damages. For the foregoing reasons, we reverse the award of the second million dollars as well as the alternative affirmative measures.

V. The punitive damages award against Valley Forge violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution.

This issue was definitively resolved by this Court in *Ivy v. General Motors Acceptance Corporation*, 612 So.2d 1108 (1992) ("In sum, this Court rejects GMAC's contention that Mississippi's system for awarding punitive damages is unconstitutional.") Under the ruling in *Ivy*, this assignment of error is without merit.

VI. The Chancery Court erred in denying Valley Forge a jury trial on the counterclaim for bad faith.

Valley Forge filed its declaratory judgment action in the Chancery Court of Jackson County. After the Stricklands filed their counterclaim seeking punitive damages, Valley Forge filed a motion requesting a jury trial, or, in the alternative, a transfer to Circuit Court. The judge denied both these motions and proceeded to trial.

This assignment of error calls upon the Court to revisit the conflict between Article 3, Section 31 and Article 6, Section 147 of the Mississippi Constitution. These sections provide, in relevant part:

> The right of trial by jury shall remain inviolate, ...

Article 3, Section 31.

> No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment and decree, from any error or

> mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction. . . .

Article 6, Section 147.

This Court unquestionably extended the power to impose punitive damages to Chancery courts in *Tideway, supra*. We did so with full knowledge of our prior decisions holding that a chancellor's failure to provide a jury trial is not grounds for reversal. *See e.g. Louisville & Nashville R.R. Co. v. Hasty,* 360 So.2d 925, 926 (Miss. 1978). Indeed, in *Tillotson v. Anders,* 551 So.2d 212 (Miss. 1989), the majority stated, "Section 31 [constitutional right to jury trial] is of no effect in chancery." (footnote 2). Thus, this assignment of error is without merit. In a proper case this Court may someday reconsider the holding in *Tillotson,* but we see no reason to grapple with the issue in a case where the complaining party chose the Chancery court as the forum.

VII. The Chancery Court erred in the calculation of damages, attorney's fees, and interest.

Finally, Valley Forge challenges the lower court rulings on the $55,000 second payment, the $30,000 in attorneys' fees, and the interest on the $25,000 payment ordered from Nationwide to Tina.

First, Valley Forge argues that even if the first payment it made to the Stricklands was not an effective settlement of Tina's claim, payment of the full amount a second time would only be appropriate if there were evidence that the funds were improperly used. The insurer cites *Succession of Emonot,* 109 La. 359, 33 So. 368 (1902), for the proposition that if a tutor accepts payment in settlement of a claim belonging to a minor without court approval, the tutor becomes liable to the minor only for the *difference between the amount received by the minor* and the total amount which the court finds should have been received. However, the tutor's liability

for mishandling monies is not at issue in this case. Under applicable Louisiana law, a compromise of a minor's claim without court approval is a nullity. *See Guidry v. Bowers,* 458 So.2d 933 (La. App. 1st Cir. 1984). Therefore, under strict application of Louisiana law, Tina never received anything. Thus, Valley Forge must pay the full limit again. Accordingly, the $55,000 award was apparently proper.

Next, Valley Forge challenges the award of attorney "fees and expenses" and prejudgment interest at the legal rate on the $25,000 payment from Nationwide. Attorney fees may be awarded in cases where punitive damages are proper, regardless of the existence of contingent fee arrangements. Likewise, in the absence of statutory authority, prejudgment interest is also allowable in cases where punitive damages are justified. *See Stanton & Associates v. Bryant Const. Co.,* 464 So.2d 499, 502 (Miss. 1985). As discussed above, punitive damages were proper in this case and consequently the award of attorney fees and interest was not error.

CONCLUSION

For the foregoing reasons, the judgment of the lower court is affirmed in all respects except for the second million dollars of punitive damages and the alternative affirmative measures, which are reversed and rendered.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

HAWKINS, C.J., PRATHER, P.J., and SULLIVAN, PITTMAN, BANKS, ROBERTS, and SMITH, JJ., concur.

McRAE, J., not participating.

APPENDIX B

IN THE CHANCERY COURT
OF JACKSON COUNTY, MISSISSIPPI

No.: 53,835

C.N.A. INSURANCE COMPANY,
Plaintiff

vs.

DARLENE STRICKLAND, MOTHER AND NEXT FRIEND OF TINA STRICKLAND, DARLENE STRICKLAND, INDIVIDUALLY, and VERGIE M. AULL,
Defendants.

JUDGMENT AND OPINION

[Filed June 26, 1990]

This cause involves Tina Strickland, a female child born April 8, 1975, who resides with her parents in Louisiana and who, while visiting her aunt, Vergie Aull, was seriously injured on July 23, 1987. Tina was injured while riding in Jackson County, Mississippi, with her aunt Vergie Aull, a Mississippi resident, in Mrs. Aull's car when a collision occurred with a vehicle driven by James Cromwell. Tina was hospitalized in Pascagoula for many weeks following the accident. Tina's injuries were enormous and will exceed $150,000.00 many times over. She suffered permanent brain damage and will be involved in therapy for years. Valley Forge, at an early date, valued Tina's claim at over $205,000.00.

While Tina was in the hospital, her parents engaged a Louisiana attorney, Robert Carter, to represent them and Tina. The attorney made demand upon the Stricklands'

insurance carrier, Valley Forge Insurance Company, a Pennsylvania corporation doing business in Louisiana and Mississippi, which had covered the Stricklands' motor vehicle in Louisiana for $55,000.00 per person ($50,000.00 being uninsured motorist coverage and $5,000.00 being medical payments coverage).

Throughout the negotiations, Valley Forge Insurance Company was represented by an agent of C.N.A. Insurance Company. C.N.A. Insurance Company is an association of several companies, but is not itself incorporated and is not a legal entity. This action was originally filed with C.N.A. as the named party plaintiff. Valley Forge Insurance Company was substituted as party plaintiff in an agreed order of this Court dated May 7, 1989, in which the Court affirmatively found that the agents and representatives of C.N.A. Insurance Company acted for and on behalf of Valley Forge Insurance Company in this matter.

Mrs. Aull had a $25,000.00 liability policy with Nationwide Insurance Company and Cromwell had a $10,000.00 liability policy with Automotive Assurance Company. Early on it was evident that Tina's damages would greatly exceed the total coverage of $90,000.00 potentially available.

Valley Forge promptly paid the policy limits, $55,000.00, on October 9, 1987, through one of its Louisiana agents to attorney Robert Carter and Tina's parents. A Subrogation Receipt and Receipt for Payment were forwarded to Mr. Carter with the draft, with instructions that the Stricklands execute them. No court approval was sought or obtained nor was a tutorship (guardianship) established. Prior to making payment, Valley Forge had actual knowledge of the limits of the Aull-Nationwide policy. Attorney Carter charged $12,000.00 as attorney fee and the balance of the money went for bills for Tina.

The Stricklands were not enthusiastic about the prospects of suing Tina's aunt, Mrs. Aull, although Attorney

Carter made formal demand on her insurance carrier Nationwide, and in June, 1988, suit was filed in Louisiana against Mrs. Aull, Nationwide, Cromwell and Automotive Casualty. Nationwide offered to pay Tina the $25,000.00, provided Valley Forge asserted no subrogation. When this was communicated to Valley Forge, Valley Forge refused to agree and asserted subrogation rights. Nationwide would not pay Tina in the face of Valley Forge's subrogation demand. On March 22, 1989, Valley Forge filed this Mississippi action to have this Court determine whether Valley Forge or the Stricklands were entiled to the $25,000.00 from Aull-Nationwide. Valley Forge contends it is entitled to the $25,000.00 pursuant to a subrogation agreement signed by Mr. and Mrs. Strickland, or on the basis of offset. The Stricklands and Tina's guardian *ad litem* contend:

1. Under Louisiana law and their own policy provisions, Valley Forge is not entitled to subrogation or offset.

2. Tina is entitled to the $25,000.00.

3. Since no court approval was obtained for the $55,000.00 payment by Valley Forge, there has been no settlement, the subrogation agreement is void, and Tina is entitled to receive a court-approved settlement of $55,000.00 from Valley Forge.

4. That Valley Forge has, by the filing of this suit, as well as by refusing to acknowledge it had no subrogation rights under the circumstances, wrongfully interferred with Tina recovering the $25,000.00 from Nationwide, which Nationwide is willing to pay, but wants to be sure it pays to the proper party.

5. The Stricklands assert Tina is entitled to punitive damages and attorneys fees. The Stricklands established that Valley Forge has a historic record in Louisiana and Mississippi of not requiring court approval of settlements with minors.

Valley Forge questions the jurisdiction of this Court over the claims of the minor. The Court finds and adjudicates that Valley Forge has submitted itself to the jurisdiction of this Court with regard to all claims raised in the complaint and the counterclaim, by initiating this action, and that this Court has jurisdiction over the minor's claims for the reason that the same represent assets of the minor located in this State. The minor has an unliquidated claim against a resident of this State, Vergie Aull. Moreover, the minor's claim against Valley Forge derives, at least in part, from its wrongful actions in this State.

The insurance contract between Valley Forge and the Stricklands was made in Louisiana and consistent with the teachings of *Boardman v. United States Auto Association*, 470 So2d 1024 (Miss., 1985) and related cases, is to be construed according to the laws of Louisiana to the extent appropriate.

IS VALLEY FORGE ENTITLED TO SUBROGATION OR OFFSET?

Applying Louisiana law, and the Valley Forge policy itself, this question must be answered in the negative. By the express terms of its insurance policy, Valley Forge provided that it would not be entitled to subrogation where the damages to the insured exceeded both the Valley Forge policy limits and the limits of other insurance companies.

The "Uninsured Motorists Coverage Amendment-Louisiana," which is the last page of the contract, part II, General Provisions, provides as follows:

> Paragraph A. of the Our Right To Recover Payment provision of Part F *does not apply to damages an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle"* as defined in Section 2 of the definition of "uninsured motor vehicle" under Part C. [Emphasis added.]

Referring to Paragraph A. of Part F, we find that the following provision, in pertinent part is the one described as *inapplicable*:

> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right.

The definition of "uninsured motor vehicle" is also provided in the amendment, under Part I Paragraph B:

> Section 2. of the definition of "uninsured motor vehicle" is replaced by the following:
>
> "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
>
> 2. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is not enough *to pay the full amount the "insured" is legally entitled to recover as damages.* [Emphasis added.]

Tina Strickland was an insured, riding in a vehicle covered by a liability insurance policy of $25,000.00, far less than the amount of her damages, which Valley Forge admits exceeded $205,000.00. Thus, the Aull vehicle was an uninsured motor vehicle under the policy. Under the "Uninsured Motorist Coverage Amendment-Louisiana," the subrogation provision of the policy does not apply to damages the insured is entitled to recover from the owner and operator of the uninsured motor vehicle. By the express terms of its own policy, Valley Forge has *no subrogation right.*

Valley Forge argues that, under the *Boardman* doctrine, Mississippi law ought to be applied because Mississippi has expressed a strong public policy in support of the right of an uninsured motorist carrier to offset, by virtue of Section 83-11-107 of the Mississippi Code. The Court sees nothing in this statute, or in the Uninsured Motorist Act as a whole, which would jusitfy a conclusion that Mississippi has such a strong interest in pro-

tecting a right of subrogation that an insurer ought to be saved from enforcement of a provision of its own policy, which denies it subrogation until after the insured is made whole. Such a provision violates no public policy or law in Louisiana or in Mississippi, but simply represents a right favorable to the insured which properly Valley Forge could bestow and which is not repugnant to Louisiana law. Under Louisiana law, subrogation and offset are subordinate to the insured's right to be made whole.

La. Rev. Stat. R.S. 22:1406 governs the issuance of uninsured motorist coverage in that state. Paragraph (2)(b) is the following definition of "uninsured motor vehicle":

> For the purposes of this Coverage the term uninsured motor vehicle shall, subject to the terms and conditions of such coverage, also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of damages suffered by an insured and/or the passengers in the insured's vehicle at the time of an accident, as agreed to by the parties and their insurers or as determined by final adjudication.

In *Bond v. Commercial Union Assur. Co.*, 407 So. 2d 401 (La. 1981), the Louisiana Supreme Court discussed the limits of the subrogation right under the statute. The Court said:

> We conclude that upon payment an insurer, pursuant to a subrogation agreement contained in its policy, becomes conventionally subrogated to its insured's right against the uninsured tortfeasor.

The Court went on to hold that insurer's right of reimbursement is subordinate to the insured's claim for the balance of the damages:

> By giving the insured who has been only partially compensated for his loss a lawful cause of prefer-

> ence over the insurer for payment out of his debtor's property, the code further implements the object to the uninsured motorists statute, which is *to promote full recovery for damages by innocent automobile accident victims* by making both primary protection and excess coverage available. [Emphasis added.]

Though Valley Forge seeks to invoke Mississippi law, for the reasons stated above, it cannot. Moreover, it is clear that, under *Dunnam v. State Farm*, 366 So2d 668 (Miss. 1979), the insurer cannot compel the guardian of a minor to execute a trust agreement giving the company the first right to recover payment from the uninsured motorist.

Accordingly, Tina is entitled to the Aull-Nationwide $25,000.00.

HAS THERE BEEN A VALID SETTLEMENT OF TINA'S CLAIM UNDER LOUISIANA LAW?

The answer to this question, in Louisiana, as well as in Mississippi, is the same, but applying Louisiana law, there has been no valid settlement.

L.S.A.—C.C.P. Art. 3071. Transaction or Compromise, definition states:

> A *transaction* or *compromise* is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

L.S.A.—C.C.P. Art. 3072. Capacity of parties; authority of tutors or curators says:

> A man to transact must have the capacity to dispose of the things included in the transaction.
>
> The tutor of a minor . . . can not make a transaction without being authorized thereto by the judge.

Art. 4265 of the Louisiana Civil Code provides as follows:

> With the approval of the court as provided in Article 4271, a tutor may compromise an action or right of action by or against the minor, or extend, renew, or in any manner modify the terms of an obligation owed by or to the minor.

The tutor occupies the same position in Louisiana law that the guardian maintains in Mississippi law. However, under Louisiana law, so long as the father and mother of the child are alive, married and living together, the father occupies the position of natural tutor. Art. 4501 is, in pertinent part, as follows:

> When both parents are alive and not divorced or judicially separated, property belonging to a minor may be sold or mortgaged, *a claim of a minor may be compromised,* and any other step may be taken affecting his interest, in the same manner and by pursuing the same forms as in case of a minor represented by a tutor, the father occupying the place of and having the powers of a tutor. [Emphasis added.]

The statute was amended to include the underlined portion, and cases decided subsequent to the amendment of Art. 4501 hold that a compromise made without court approval is not binding on the minor. This is in keeping with earlier cases holding that transactions falling under the statute are void if no court approval is obtained. *Chambers v. Chambers,* 6 So. 659 (La. 1889). (A transaction or compromise has no force or effect in respect to minors, unless same is duly authorized by a judge.) In *Johnson v. Ford Motor Co.,* 707 F.2d 189 (5th Cir. 1983), the Fifth Circuit, interpreting Louisiana law, held that compromises entered into absent court approval under article 4271 are of no legal effect.

Under the Mississippi cases of *Union Chevrolet v. Arrington*, 162 Miss. 816, 138 So. 593 (Miss. 1931) and *Mississippi State Bar v. Moyo*, 525 So. 2d 1289 (1988), the settlement would be invalid even if Mississippi law were applied. Moreover, these cases express a strong public policy in this State of protecting the rights of minors in their dealings with others. In *Union Chevrolet*, Justice Griffith said:

> The court will not and cannot permit the rights of an infant to be prejudiced by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct. [Citations omitted.] *All persons who deal with* guardians or with *the Courts in respect to the rights of infants are charged with the knowledge of* [*certain*] *principles, and act to the contrary thereof at their peril.* [Emphasis added.]

Thus, our law charges all persons dealing with minors with a duty to know and follow the requirements of the law. When, as here, the insurance company elects not to do so, or fails to do so, it has acted at its peril and lost.

IS VALLEY FORGE LIABLE TO TINA FOR INTEREST ON THE NATIONWIDE $25,000.00?

Valley Forge is liable for the interest at the rate of 8% per annum from the date Nationwide was prepared and willing to pay the $25,000.00 until such sum is paid. Nationwide offered the $25,000.00 limits to Tina Strickland on November 29, 1988. By virtue of its own policy provisions, as well as Louisiana Law, Valley Forge knew it was not entitled to subrogation or offset as against Nationwide or Automotive, as discussed in the previous paragraph.

IS TINA ENTITLED TO RECOVER PUNITIVE DAMAGES FROM VALLEY FORGE?

The Stricklands cite no Louisiana authority for the allowance of punitive damages. Valley Forge asserts the reason is that there is no authority in Louisiana for punitive damages in such a case as this. The Stricklands ask the Court to apply Mississippi law to this issue. The Court notes that each side has asked this Court to apply to each of them, on the one hand, those Louisiana laws which favor their side on some issues and apply Mississippi laws which favor their side on other issues. *Boardman, supra,* teaches that the center of gravity test is applied issue by issue, not necessarily to the case as a whole. The question is, then, whether there are circumstances in this case which make it proper for the Court to apply Mississippi law to determine whether punitive damages should be considered. As *Boardman* notes ". . . no foreign state's substantive law will be enforced in courts of this state where to do so would be offensive to the deeply ingrained or strongly felt public policy of the state." Also, ". . . in deciding each new case a judgment call is necessary."

Apparently, Louisiana does not allow punitive damages. Mississippi does. It is conduct which determines the applicability of punitive damages.

Is there a substantial interest in upholding the public policy of this state which permits consideration of punitive damages in proper cases if this Court were to determine this to be a proper case? *Arrington* and *Moyo, supra,* assert a powerful public policy for protecting minors, a policy which is deeply ingrained and strongly demonstrated in the legal history of Mississippi. Our laws have persistently and forcefully thrown a protective cloak over children and our courts have been mandated to act as "superior guardians" to see that children's rights are fully and faithfully respected by all who deal with them.

Against this backdrop, Valley Forge has asserted subrogation/offset rights to receive the Aull-Nationwide $25,000.00 to the exclusion of Tina, notwithstanding Valley Forge's actual knowledge that Tina's damages greatly exceed *all* insurance coverage potentially available. Valley Forge's subrogation/offset assertion is made in the face of Valley Forge's own policy provisions and Louisiana law, both clearly to the contrary of Valley Forge's assertion. Valley Forge seeks to justify its assertion by saying it did so only because Tina was not seeking recovery of the $25,000.00 from Aull-Nationwide and that Mississippi law allowed offset. Valley Forge ignores the fact that the Stricklands' attorney in 1987 had demanded payment from Aull-Nationwide and filed suit in Louisiana in June, 1988, seeking recovery from Aull-Nationwide and Cromwell-Automotive. The facts belie Valley Forge's assertion.

This record does not demonstrate that $12,000.00 was a reasonable fee for services of Attorney Carter, but, in any event, any fee he may have been entitled to was subject to the approval of a court in Louisiana and such was not obtained, despite the clear requirements of both Louisiana and Mississippi law. If this were the only instance where Valley Forge had failed to obtain court approval of minors' settlements, one might view it as a simple mistake. But, by their own admissions, not obtaining court approval is a long-established pattern of conduct for Valley Forge, both in Louisiana and Mississippi. A Louisiana court initially should have been asked ot deal with the subrogation/offset issue, if, indeed there was any question. There was no validity to the subrogation agreement signed by the Stricklands. Unless Valley Forge is firmly called to task, it may well continue to ignore the laws of Louisiana and Mississippi designed for the protection of children. It is not sufficient to say that requiring Valley Forge to pay the $55,000.00 again is all that is necessary, that this is protection enough for a particular minor. What about the other minors whose

claims have been or may yet be settled by Valley Forge without a court adjudication that: the settlement is reasonable, fair, and in the best interest of the child, that only a reasonable attorney fee is paid by the minor, and that the funds are the funds of the *minor* for the *minor's damages* and not the funds of the parents. Among the basic responsibilities of parents to a child is that of providing the child with medical care when necessary. This parental obligation exists independent of the cause of the need for medical care; i.e., a parent cannot fail to provide medical care to the child because a third party caused injury to the child. While the third party may ultimately be held liable, the parent cannot wait to provide the medical care. The priority is for the child to receive medical care and for the child to be compensated for her damages. Then, perhaps, it may be appropriate in some cases to consider whether any of the child's money should be used to pay all or part of the parent's debt for the medical care of the child.

Valley Forge initiated this action charged with the knowledge that he who comes into equity must come with clean hands. Asserting a claim contrary to their own policy and contrary to Louisiana law is tainted conduct. Valley Forge points out that Mississippi allows offset regardless of whether the insured's loss may exceed all insurance combined. Louisiana law does not. Had a Louisiana court approved the settlement, that court would have directed any additional steps to be taken to protect further the rights of Tina and could have nipped in the bud the subrogation/offset issue. The Louisiana courts were denied that opportunity by Valley Forge's long-standing practice by which it did not seek court approval. Minors' settlements made beyond the view of the court afford opportunities for the innocent, ignorant and unwritting to be fleeced, hence our historic laws to protect children.

Valley Forge considered Tina's claim worth more than $205,000.00. Valley Forge knew, or should have known,

that the subrogation agreement signed for Valley Forge by the Stricklands was void, or at least subordinate to Tina's being made whole. Valley Forge knew Louisiana law did not permit subrogation or offset until after the insured is made whole. Valley Forge knew there was not sufficient insurance available to make Tina whole. Valley Forge knew it did not obtain court approval of the settlement of Tina's claim. Valley Forge knew Tina was seeking recovery of the $25,000.00 from Aull-Nationwide, and $10,000.00 from Cromwell-Automotive. Armed with all this information, Valley Forge's subrogation/offset contention is without merit and frivolous. Armed with such information, Valley Forge has engaged in a bad faith effort to assert in Mississippi a contention Valley Forge knows it cannot successfully assert in Louisiana, the state where the contract was made. This wilful and wanton conduct, in callous disregard for the rights of a protected group, easily meets the standard for imposition of punitive damages established by our Mississippi Supreme Court. Misconduct such as this compels the conclusion that it is entirely proper, in fact, essential, that the Court apply Mississippi law concerning punitive damages to avoid offending the deeply ingrained and strongly felt public policy of Mississippi to protect minors, and which allows punitive damages to punish a wrongdoer and to deter others from similar transgressions in the future. In assessing punitive damages, the Court considers the net worth of the counterdefendant, Valley Forge. According to its financial statement, that amount, shown as surplus, is $68,561,440.00.

Corporations exist as a result of a privilege granted from the people through the state. This privilege does not include the right to select the laws it will obey. Children are a special class and receive special protection by the laws of all states. Corporations are obliged to respect such laws. Corporate decisions and policies are made by people. The corporation, however, pays when bad decisions and policies are made. It behooves managers, of-

ficers, directors and stockholders to require that corporate decisions not ignore clearly expressed public policy.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the counterclaimant, as mother and next friend of Tina Strickland, be and hereby is awarded judgment of and from the counterdefendant, Valley Forge Insurance Company, in the sum of $55,000.00, representing the full policy limits, plus interest at 8 percent per annum, compounded annually, from the date Nationwide's offer of settlement, being November 29, 1988, until paid.

2. That the plaintiff/counterdefendant Valley Forge is not entitled to subrogation as to the Aull-Nationwide or the Cromell-Automotive policy limits but as between said parties, Tina Strickland is entitled thereto; further that the counterclaimant, as mother and next friend of Tina Strickland, a minor, be and is hereby awarded judgment of and from the counterdefendant for interest in the amount of 8% per annum, compounded annually, on said $25,000.00, from the date of Nationwide's offer of settlement, being November 29, 1988, until paid.

3. That the counterclaimant, as mother and next friend of the minor, Tina Strickland, be and she is hereby awarded judgment of and from the counterdefendant, Valley Forge Insurance Company, for punitive damages in the sum of $2,000,000.00, payable as follows:

   A. $1,000,000.00, payable immediately to Tina Strickland.

   B. $1,000,000.00, payable to Tina Strickland on October 1, 1990, unless prior to that date Valley Forge has done the following:

(1) Adopted a written corporate policy approved on its minutes by its Board of Directors, directing all of its officers, agents and employees to obtain court approval of all of its minors' settlements in Mississippi which are not by law excused from court approval.

(2) Conducted training sessions for all of its officers, agents and employees, educating them as to such minors' settlements policy and applicable Mississippi law, and providing such training to new and future employees.

(4) Filed with this court and with the Insurance Commissioner of Mississippi written evidence that the above-stated requirements have been met and details as to how such was accomplished, including a certified copy of the corporate minutes by which the corporate policy is established, and a statement of how it proposes in the future to continue to carry out such requirements.

(4) Published an ad as hereinafter directed in three consecutive Sunday editions of the following newspapers distributed in Mississippi:

(a) *Clarion-Ledger*, Jackson, Mississippi

(b) Mississippi edition of Memphis *Commercial Appeal*

(c) *Northeast Mississippi Journal*, Tupelo, Mississippi

(d) Meridian *Star*, Meridian, Mississippi

(e) Hattiesburg *American*, Hattieburg, Mississippi

(f) McComb *Enterprise-Journal*, McComb, Mississippi

(g) *Mississippi Sun*, Gulfport, Mississippi

(h) *Mississippi Press*, Pascagoula, Mississippi

(i) Natchez *Democrat*, Natchez, Mississippi,

such ad to read as follows:

"Valley Forge Insurance Company, a member of the CNA group of insurance companies, whose members, as of October 9, 1987, were:

American Casualty Co.

CNA Casualty of California

CNA Lloyds of Texas

Continental Casualty Co.

National Fire Insurance Co.

Transcontinental Insurance Co.

Transportation Insurance Co.

Valley Forge Insurance Co.

has disclosed through sworn testimony of one of its representatives, an employee of CNA Insurance Companies, during the trial of "C.N.A. INSURANCE COMPANY, PLAINTIFF VS. DARLENE STRICKLAND, MOTHER AND NEXT FRIEND OF TINA STRICKLAND, DARLENE STRICKLAND, INDIVIDUALLY, AND VERGIE M. AULL, DEFENDANTS" being Jackson County, Mississippi, Chancery Court Civil Action Number 53,835, Robert H. Oswald, Chancellor, presiding, that it has been the customary practice of C.N.A. companies, not to seek court approval of the settlement of minors' (children's) uninsured/underinsured damages, at least in the states of Mississippi and Louisiana,

A VIOLATION OF LAW
REGARDING CHILDREN

The law of both states requires that the settlement of such damages and matters related to minors and those settlements be approved by a Court of competent jurisdiction.

If you, in the last several years, have had a child who received money damages from one of the C.N.A. companies, or any other insurance company, and you know that it was not approved through a court, then contact:

Honorable Robert Oswald
Chancellor
P. O. Box 998
Pascagoula, Mississippi 39567-0998

PUBLISHED PURSUANT TO JUDGMENT OF THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI, RENDERED JUNE —, 1990."

All proofs of each proposed advertisement must be submitted to this Court for the Court's approval prior to publication. The Court may make such changes as size, design, type style and/or size, as the Court may deem necessary to insure that the purpose of this advertisement is fulfilled. A Proof of Publication shall be submitted to the Court within ten (10) days of the date of last publication to show obedience to this part of this Judgment. Such shall be at least four (4) columns wide by a least twelve (12) inches tall and bounded by, at least, a one-half (½) inch heavy black border enclosing the entire advertisement and using for the printing of the verbiage, 24 point or greater type.

Such ad shall not be printed in the classified ad section, but shall be placed in each of such newspapers in a conspicuous manner designed to attract general public attention.

4. That the counterclaimant shall take all action necessary to establish a tutorship for the estate of Tina Strickland, a minor, and that all sums recovered on behalf of the minor pursuant to this judgment shall be placed in a tutorship account, to be administered by a Louisiana court having jurisdiction over said minor.

5. That the contract of employment between Alvin Denman and Darlene Strickland and T. Patrick Welch, Esq., entitling said attorney, and his co-counsel, to thirty-three and one-third per cent of all sums recovered for the minor, be and hereby is approved.

6. That the counterclaimant, for and on behalf of Tina Strickland, a minor, be and is hereby awarded judgment of and from the counterdefendant for attorneys' fees and expenses in the amount of $30,000.

7. That the counterclaimant be and is hereby awarded costs in this action.

8. That, pursuant to Section 75-17-7 of the Mississippi Code, as amended, interest shall run on this judgment at 8% per annum, compounded annually, beginning June 26, 1990.

SO ORDERED, ADJUDGED AND DECREED, this the 26th day of June, 1990.

/s/ Robert H. Oswald
Chancellor

APPENDIX C

SUPREME COURT OF MISSISSIPPI

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This is to advise you that the Mississippi Supreme Court rendered the following decision on the 22nd Day of July, 1993.

Supreme Court Case #90-CA-0933
Trial Court Case #53835

Valley Forge Insurance Company/
CNA Insurance Company

vs.

Darlene Strickland, Mother and Next Friend
of Tina Strickland, and
Darlene Strickland, Individually

Petition for Rehearing Denied. Prather, P.J. and McRae, J., Not Participating.

Supreme Court Clerk

lwp

ccs: Jim Kitchens
T. Patrick Welch
Jackson County Chancery Clerk

Supreme Court, U.S.
FILED
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No. 93-623

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

VALLEY FORGE INSURANCE CO.,
Petitioner,

v.

DARLENE STRICKLAND, Mother and Next Friend of TINA STRICKLAND, and DARLENE STRICKLAND, Individually,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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November 17, 1993

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
SUMMARY OF RESPONDENTS' ARGUMENT	3
ARGUMENT	4
Question 1.	4
Question 2.	21
CONCLUSION	28

TABLE OF AUTHORITIES

CASES — Page

Andrew Jackson Life Ins. Co. v. Williams, 566 So.2d 1172 (Miss. 1990) 8, 9, 10, 11, 26, 28
Bankers Life & Casualty Co. v. Crenshaw, 483 So.2d 254 (Miss. 1985) 5, 8, 9
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) .. 10, 11
Central Alabama Electric Cooperative v. Tapley, 546 So.2d 371 (Ala. 1989) 15
Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) ..... *passim*
Ivy v. General Motors Acceptance Corporation, 612 So.2d 1108 (1992) 10, 11
Mutual Life Ins. Co. v. Estate of Wesson, 517 So.2d 521 (Miss. 1987), cert. denied, 486 U.S. 1043, 108 S.Ct. 2035, 100 L.Ed.2d 620 (1988) 5
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1082, 113 L.Ed.2d 1 (1991) ..... *passim*
St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63, 40 S.Ct. 71, 64 L.Ed. 139 (1919) 24
TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992) 10
TXO Production Corp. v. Alliance Resources Corp., —— U.S. ——, 113 S.Ct. 2711, 125 L.Ed. 366 (1993) ..... *passim*
Valley Forge Ins./CNA v. Strickland, 620 So.2d 535 (Miss. 1993) 9, 10, 11, 14, 15, 25, 26
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417 (1909) 24

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VALLEY FORGE INSURANCE CO.,
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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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BRIEF IN OPPOSITION

Respondents Darlene Strickland, Mother and Next Friend of Tina Strickland, and Darlene Strickland, Individually, respectfully oppose the petition of Valley Forge Insurance Company for a writ of certiorari to review the decision of the Supreme Court of Mississippi.

STATEMENT

Respectfully, Respondents assert that Petitioner attempts to raise an issue that was not raised succinctly at the appellate court level. On appeal to the Mississippi Supreme Court, Petitioner generically raised as its only Constitutional issue regarding punitive damages:

> V. The punitive damages award against Valley Forge violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution.

This Court has previously refused to consider issues concerning punitive damages first succinctly raised only to this Court. (*Cf. Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 1039, 113 L.Ed2d. 1 (1991)).

As discussed in Rule 15.1 of this Court's Rules, Respondents wish to point out a gross misstatement of fact by Petitioner in its Statement where Valley Forge asserts that prior to the November 28, 1988, offer of Nationwide to pay Tina its policy limits," . . . Valley Forge had never asserted subrogation rights with respect to the Nationwide policy . . . ." (*Cf.* page 3, Petition of Petitioner.) Petitioner's File Activity Sheet reflects that Valley Forge's adjuster (its trial representative) sent a first lien letter to Nationwide's policyholder with a copy to Nationwide's adjuster on November 30, 1987. (Ex. 6 to Tr. Ex. 5.) That letter requested one of the tortfeasor's, Nationwide's policyholder, and Nationwide contact Valley Forge within ten days to make financial arrangements for repayment.

Respondents also wish to point out the omission by Petitioner of the most critical fact/evidence regarding the punitive damages award. The applicable insurance contract which governed the binder in effect at the time of the accident contained a Louisiana endorsement/amendment to comply with Louisiana law.[1] Without the Uninsured Motorists Coverage Amendment—Louisiana, Petitioner would have had arguendo, under its standard insurance contract with a court-authorized signing of Petitioner's Subrogation Receipt, Ex. 35 to Trial Ex. 4, the

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[1] UNINSURED MOTORISTS COVERAGE AMENDMENT—LOUISIANA

II. GENERAL PROVISIONS

Paragraph A of *Our Right To Recover Payment* provision of part F *does not apply to damages an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle"* as defined in Section 2, of the definition of "uninsured motor vehicle" under Part C. (Trial Ex. 3) (Emphasis Respondents'.)

right of subrogation to any and all funds available from the tortfeasors.[2-3] The Subrogation Receipt purported to assign to Petitioner ". . . all the rights, claims, interest, choses or things in action to the extent of the amount paid . . .". (Ex. 35 to Tr. Ex. 5, p. 263). This was done without consideration that the defined insured was a minor; her damages, as determined by Petitioner, while the child was still in a coma in the hospital, were then valued at over $205,000.00; Petitioner knew before its payment that the maximum amount of all other insurance from the tortfeasors amounted to $35,000; without any court approval, Petitioner required Petitioner's Subrogation Receipt to be signed by the child's parents before the disbursement by any funds paid by Petitioner; and, with Petitioner having full knowledge that subrogation by it violated not only Louisiana statutory law, but also the terms of Petitioner's own Uninsured Motorists Coverage Amendment-Louisiana, to its insurance contract. (Appendix B, pages 16a and 26a, Petition of Petitioner.)

SUMMARY OF RESPONDENTS' ARGUMENT

Mississippi Supreme Court standards for the imposition and review of punitive damages provide sufficiently definite and meaningful constraints on the fact finder's discretion so as to satisfy the Due Process Clause of the Fourteenth Amendment. *Pacific Mutual Life Ins. Co. v.*

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[2] Pertinent parts of Petitioner's insurance contract are set forth in this Brief in Opposition from the trial court's Judgment and Opinion with the emphasis contained therein being the trial court's. Appendix B, pages 19a and 20a, Petition of Petitioner. The quoted parts are from Trial Ex. 3, at pages 1, 4, 8 and the last page of that exhibit.

[3] La.C.C. art. 2162. Louisiana law precludes subrogation until the defined insured is paid the full amount the insured is legally entitled to recover as damages. With other insurance available to be recovered, under the facts of this case, Strickland does not believe than any Louisiana court would have authorized the signing of Petitioner's Subrogation Receipt which makes the failure to obtain court authorization even more significant.

Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, —— U.S. ——, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *Eichenseer v. Reserve Life Ins. Co.*, 934 F2d 1377 (5th Cir., 1991).

The award of punitive damages in this case did not violate Petitioner's perceived substantive due process rights and was certainly neither excessive nor arbitrary. *Haslip*, supra; *TXO*, supra; *Eichenseer*, supra.

ARGUMENT

Eichenseer was remanded by this Court in 1991, to the Fifth Circuit Court of Appeals for reconsideration, in light of *Haslip*, of Mississippi's procedures for review of a punitive damages award to insure no violation of due process.

Question 1.

The Fifth Circuit in its review of *Eichenseer* found that:

> Whether an award is large or small, however, the procedural protection need not be exhaustive. As long as there is some meaningful procedural assurance that the amount of the award is not an impulsive reaction to the wrongful conduct of the defendant, the award survives the procedural protection aspect of the due process analysis in *Haslip*. In the instant case, we conclude that the procedure used in assessing and reviewing the amount of the punitive damages award was constitutionally sufficient.

Eichenseer, 934 F.2d at 1385. In essence, that court found that the Constitutional safeguards regarding the awarding and reviewing of punitive damages in view of this Court's *Haslip* decision, in Mississippi, were constitutionally sufficient. That court further said:

> Mississippi law limits the amount of punitive damages that a trial court can impose against a defendant. The trial court does not possess unbridled discretion

> to fashion the amount of a punitive damages award. Rather, under Mississippi law, the trial court determines an appropriate amount of damages with reference to the following factors: (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future; (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses; (3) The pecuniary ability or financial worth of the defendant. *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985). The court should also consider the degree of the offense, the presence or absence of malice, the motive behind the actions, the injury intended, and the public sense of justice and propriety. See *Mutual Life Ins. Co. v. Estate of Wesson*, 517 So.2d 521, 532 (Miss.1987), cert. denied, 486 U.S. 1043, 108 S.Ct. 2035, 100 L.Ed.2d 620 (1988).
>
> Without question, these criteria leave the trial court significant discretion in its determination of punitive damages. But this discretion is not unlimited.

Eichenseer, 934 F.2d at 1385.

As in the case *sub judice*, in *Eichenseer*, the district court in a bench trial rendered an exhaustive opinion from its finding of facts, and its judgment was based on, as in the case *sub judice*, the egregiousness of the insurance company's conduct with an eye toward the approved public policy goals of deterrence and retribution.

In the case *sub judice*, the Chancellor [4] in his Judgment and Opinion in answer to the question of whether Petitioner was entitled to subrogation or offset, found:

> Applyng Louisiana law, and the Valley Forge policy itself, this question must be answered in the negative.

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[4] Mississippi's highest level of trial courts is bifurcated. The law side is generally in the circuit court side and is presided over by a circuit judge. The equity side, where this case was filed by Petitioner and ultimately tried, is presided over by a chancellor.

By the express terms of its insurance policy, Valley Forge provided that it would not be entitled to subrogation where the damages to the insured exceeded both the Valley Forge policy limits and the limits of other insurance companies.

The "Uninsured Motorists Coverage Amendment-Louisiana," which is the last page of the contract, part II, General Provisions, provides as follows:

Paragarph A. of the Our Right To Recover Payment provision of Part F *does not apply to damages an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle"* as defined in Section 2 of the definition of "uninsured motor vehicle" under Part C. [Emphasis added.]

Referring to Paragraph A. of Part F, we find that the following provision, in pertinent part, is the one described as *inapplicable*:

> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right.

The definition of "uninsured motor vehicle" is also provided in the amendment, under Part I Paragraph B:

Section 2. of the definition of "uninsured motor vehicle" is replaced by the following:

> "Uninsured motor vehicle" means a land motor vehicle or trailer of any type.

2. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is not enough *to pay the full amount the "insured" is legally entitled to recover as damages.* [Emphasis added.]

Tina Strickland was an insured, riding in a vehicle covered by a liability insurance policy of $25,000.00, far less than the amount of her damages, which Valley

> Forge admits exceeded $205,000.00. Thus, the Aull vehicle was an uninsured motor vehicle under the policy. Under the "Uninsured Motorists Coverage Amendment-Louisiana," the subrogation provision of the policy does not apply to damages the insured is entitled to recover from the owner and operator of the uninsured motor vehicle. By the express terms of its own policy, Valley Forge has *no subrogation right*.

(Emphasis, the trial court's.) Appendix B, pages 19a and 20a, Petition of Petitioner.

The Chancellor, after the finding of those facts set forth above, considered the question of whether it should assess punitive damages against Valley Forge. The court there considered the same elements as later enumerated in *Eichenseer*. When considering whether to award punitive damages, and not as Petitioner suggests, the trial court first considered the egregious conduct of Petitioner's asserting a right of subrogation when by the express terms of its own policy and applicable Louisiana law, Petitioner had no subrogation right.

In awarding the unconditional $1,000,000 punitive damages, without knowing that later the same year this Court would decide *Haslip*, or, that the next year the Fifth Circuit would reconsider *Eichenseer*, the trial court applied those principals in determining its unconditional award. The trial court found:

> Against this backdrop, Valley Forge has asserted subrogation/offset rights to receive the Aull-Nationwide $25,000.00 to the exclusion of Tina, notwithstanding Valley Forge's actual knowledge that Tina's damages greatly exceed *all* insurance coverage potentially available. Valley Forge's subrogation/offset assertion is made in the face of Valley Forge's own policy provisions and Louisiana law, both clearly to the contrary of Valley Forge's assertion. Valley Forge seeks to justify its assertion by saying it did so only because Tina was not seeking recovery of the $25,000.00 from Aull-Nationwide and that Missis-

> sippi law allowed offset. Valley Forge ignores the fact that the Stricklands' attorney in 1987 had demanded payment from Aull-Nationwide and filed suit in Louisiana in June, 1988, seeking recovery from Aull-Nationwide and Cromwell-Automotive. The facts belie Valley Forge's assertion.

(Emphasis, the trial court's.) Appendix B, page 26a, Petition of Petitioner.

The trial court was knowledgeable of the pecuniary ability and financial worth of Petitioner in awarding unconditionally the $1,000,000 punitive damages. The trial court awarded the amount necessary for the punishment of the wrongdoing of Petitioner making it an example to others in the hope of deterring it and others in the future from such reprehensible conduct as asserting a right of subrogation which it had expressly relinquished by its policy binder, not to mention applicable Louisiana law, the state in which the policy binder was issued. It is evident that the trial court considered both the malice and degree of the offense: Petitioner's asserting a right it claimed to have, with the motive of unjustly enriching itself to the economic injury of a brain-damaged minor. Certainly the public sense of justice and propriety of such action was appalled by such reprehensible and unfathomable conduct.

The Mississippi Supreme Court used without citation the pronouncements of this Court in *Haslip* and *TXO* (Valley Forge's Petition for Rehearing having been denied after *TXO* was decided) and the Fifth Circuit's reconsideration of *Eichenseer*. In fact, the Mississippi Supreme Court specifically used almost identically the above-cited verbiage of *Eichenseer* in reviewing the punitive damages award.

> No hard and fast rule exists for establishing the maximum amount of punitive damages awardable in any given case. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss.1990); *Bankers Life*

> *and Cas. Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985). Instead, the amount must be considered in light of several factors. First, the amount awarded should serve to punish the insurer and to deter it from committing similar offenses in the future. Second, the amount should serve as an example set to deter others from committing similar offenses. Third, the amount awarded should account for the insurer's pecuniary ability and financial worth. And fourth, the amount constitutes compensation for the plaintiff for his or her "public service" in bringing the action. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss.1990).

Valley Forge Ins. CNA v. Strickland, 620 So.2d 535, 540-541 (Miss. 1993). Appendix A, page 11a, Valley Forge's Petition. Petitioner had specifically called to that court's attention in its brief *Haslip*, in oral argument both *Haslip* and the then pendency of this Court's consideration of *TXO* and then again in its Petition for Rehearing both of those cases.

The Mississippi Supreme Court agreed with the lower court's finding of facts when it said:

> On appeal, an award will be disturbed only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court. *Williams*, 566 So.2d at 1190; *Crenshaw*, 483 So.2d at 278.
>
> The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases. See e.g., *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss.1990) (5¼ percent of net worth affirmed). Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias, or prejudice on the part of the chancellor.

Strickland, 620 So.2d at 541. Appendix A, page 11a, Petition of Petitioner. In fact, while adding the *Eichenseer* elements, it continued the traditional standard of "so excessive that it evinces passion, bias and prejudice on the part of the [trier of fact] so as to shock the conscience of the court." As the Supreme Court of Appeals of West Virginia did in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), the Mississippi Supreme Court compared the punitive award in *Strickland* to similar cases and found that this award was proportionately lower. The Mississippi Supreme Court went even further. It restated a more limiting standard than discussed in *Haslip*, *TXO*, or *Eichenseer*.

> [P]unitive damages in Chancery Court are not favored and are to be allowed only with caution and within narrow limits.

Strickland, 620 So.2d at 541. Appendix A, page 12a, Petition of Petitioner.

Petitioner, in essence, complains that the Mississippi Supreme Court when considering the question of whether the punitive damages award against Petitioner violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution, did not go to sufficient length in addressing that issue. The opinion simply stated:

> This issue was definitively resolved by this Court in *Ivy v. General Motors Acceptance Corporation*, 612 So.2d 1108 (1992) ("In sum, this Court rejects GMAC's contention that Mississippi's system of awarding punitive damages is unconstitutional.") Under the ruling in Ivy, this assignment of error is without merit.

Strickland, 620 So.2d at 541-542. Appendix A, page 13a, Petition of Petitioner. Petitioner has failed to take into consideration that the Mississippi Supreme Court in *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss. 1990), an ante-*Haslip*, but post-*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-80, 108

S.Ct. 1645, 100 L.Ed.2d 62 (1988) decision, reviewed in detail the standards for the imposition of punitive damages which historically have been seldom awarded in Mississippi. (*Cf. Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d at pages 1182-1192.) The Mississippi Supreme Court again reviewed punitive damages awards in Mississippi in *Ivy v. General Motors Acceptance Corporation*, 612 So.2d 1108 (1992) in light of *Haslip* and found that Mississippi did have constitutionally sound standards which did provide sufficiently definite and meaningful constraints on the fact finder's discretion so as to satisfy the Due Process Clause. Examples of those constraints are in *Ivy*, where the Mississippi Supreme Court refused to reinstate a jury award of $100,000 in punitive damages, and in this very case, *Strickland*, in which the Mississippi Supreme Court reversed and rendered the "condiitonal" second $1,000,000 of punitive damages; this despite the representation of Petitioner that there has been only a single instance where there has been a significant reduction in a punitive damages award.[5] (*Cf.* Petition of Petitioner, page 14.)

Mississippi has sufficiently definite and meaningful constraints on the fact finder's discretion to satisfy the Due Process Clause. Among those constraints are the following factors: (1) such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future; (2) such amount as is reasonably necessary to make an example of the defendant so that others may be deterred

[5] There have been at least five post-*Haslip* decisions by the Mississippi Supreme Court which have reversed and/or rendered punitive damages awards. *Dynasteel Corp. v. Aztec Industries, Inc.*, 611 So.2d 977 (Miss., Dec. 31, 1992), $15,000; *Snow Lake Shores Property Owners Corp. v. Smith*, 610 So.2d 357 (Miss., Dec. 10, 1992), $5,900; *Finkelberg v. Luckett*, 608 So.2d 1214 (Miss., Aug. 19, 1992), $1,500,000 by a chancellor; *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss., Feb. 19, 1992); $175,000; *Strickland v. Rossini*, 589 So.2d 1268 (Miss., Nov. 13, 1991), $62,000.

from the commission of similar offenses; (3) the pecuniary ability or financial worth of the defendant; (4) the degree of the offense; (5) the presence or absence of malice; (6) the motive behind the actions; (7) the injury intended; (8) the public sense of justice and propriety; (9) in this case, punitive damages in Chancery Court are not favored and are to be allowed only with caution and within narrow limits; and, (10) even given all of the foregoing having been found against the wrongdoer, the review process still must consider whether the award is so excessive that it evinces passion, bias and prejudice on the part of the trier of fact so as to shock the conscience of the court.

As this Court said in *Haslip*,

> So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. [Citation omitted.] In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional. " 'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " [Citations omitted.] As the Court in Day v. Woodworth made clear, the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's test or history indicates an intention on the part of its drafters to overturn the prevailing method. [Citations omitted.]

Haslip, 111 S. Ct. at 1043.

After reviewing the *Haslip* instructions, this Court found

> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was con-

> fined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App. 106. The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
>
> These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decision making and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied.

Haslip, 111 S. Ct. at 1044.

The trial court, by imposition of its punitive damages award, sought only deterrence and retribution, the state policy concerns sought to be advanced. The trial court award was based on a thorough consideration of the character and the degree of the wrong committed by the Petitioner as shown by the evidence (asserting a claim for subrogation when it did not have one) with the only goal being preventing a similar wrong in the future by Petitioner or some other entity. Certainly, the trial court knew the nature and purpose of punitive damages was punishment for the civil wrongdoing of Petitioner, and that the imposition was not compulsory. In short, the trial court, and subsequently the Mississippi Supreme Court, recognized the award to be in furtherance of Mississippi's appropriate public policy of deterrence and retribution.

Haslip also found factors

> "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." Ibid. The Hammond test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

Haslip, 111 S. Ct. at 1044. The Mississippi Supreme Court found, as the trial court had found in its Judgment and Opinion [6], that under Petitioner's own policy, it had no subrogation right. It asserted its subrogation right by intentionally withholding from both its trial counsel and Respondents' counsel (despite timely discovery requests) a copy of the applicable policy until the day before trial. There can be no question regarding Petitioner's culpability, demonstrated by its filing a foundationless declaratory judgment action when Petitioner well knew that such violated not only applicable Louisiana law, but the terms of its own policy.

Mississippi has a implicit mandatory public policy obligation to protect its citizens. In the furtherance of this policy, Mississippi must discourage others from this and similar conduct and, to the greatest extent possible, minimize the impact on innocent third patries such as here, Petitioner's defined insured, the minor Tina Strickland. (As a result Tina lost the use of desperately needed funds, unquestionably suffering serious damages. *Strickland*, 620 So.2d at 540.)

The Mississippi Supreme Court did undertake a comparative analysis.

> In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases.

Strickland, 620 So.2d at 541.

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[6] **Appendix B, Petition of Petitioner, page 20a.**

This Court by dicta approved the refinement of Alabama's punitive damages award review when it considered that court's decision in *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 377-378 (Ala. 1989) in *Haslip*.

> It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.
>
> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages.

Haslip, 111 S.Ct. at 1045. The record from the *Strickland* case discloses that each element approvingly mentioned by this Court in *Haslip* from *Central Alabama* was fully considered by both the trial and appellate courts, with the possible exception of the imposition of criminal sanctions and the existence of other civil awards against the defendant for the same conduct. Respondents are not cognizant of other civil awards, but Petitioner admits

in its Petition to the commission of the same conduct.[7] In fact, Petitioner's trial representative testified that even where a minor was involved, even if it was Petitioner's insured, routinely a subrogation receipt was executed.[8-9]

Respectfully, Respondents believe that it has been demonstrated that the trial and appellate courts in the case *sub judice* went beyond *Haslip* in providing sufficient definite and meaningful constraints and certainly satisfy the Due Process Clause of the Fourteenth Amendment.

As to this Court's pronouncements in *TXO*:

> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

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[7] Petition of Petitioners, page 3.

> . . . ([A]lthough upon paying Tina's claim, Valley Forge did have the Stricklands execute certain forms, *including a subrogation receipt, as a matter of routine*). (Emphasis, Respondents'.)

[8] With the check, Petitioner's adjuster forwarded the Subrogation Receipt and Release and her business card, upon which she wrote the following note:

> "Bob-Please have attached properly executed & returned *prior to disbursing funds.* Thanks, d.n." (Tr. Ex. 5, p. 47; Dep. Ex. 18.) (Emphasis, Respondents'.)

[9] Petitioner's trial representative testified that she *never* got court approval of a claim under a CNA policy for a minor child or a CNA insured. (Tr. Ex. 5, dep. p. 55) At trial it became evident that this included instances when the CNA insured was actually the tortfeasor! (Tr., pages 89, 90.) Thus, her customary practice in both Louisiana and Mississippi was to allow the parents of the minor to settle the minor's claim *even when the parent was the negligent party.* (Emphasis, Respondents'.)

TXO, 113 S.Ct. at page 2722-2723. In the case *sub judice*, excluding attorneys' fees, the actual damages suffered by Tina exceeded $80,000.00. The actual damages were more than four times those in *TXO*; the punitive damages award was $1,000,000, one-tenth that of *TXO*. Though the amount of money potentially at stake is less here, the factors announced by this Court in *TXO* are basically the same. The bad faith of Petitioner in assertting through its declaratory judgment action a right of subrogation which by the express terms of its own policy it had expressly relinquished by contract, and which it did not have under applicable Louisiana law, amounts to reprehensible conduct.

This is a scheme employed by Petitioner not only in this case, but is its customary practice in both Louisiana and Mississippi. In fact, it is Petitioner's customary practice in both Louisiana and Mississippi to allow the parents of the minor to settle the minor's claim even when the parent was the negligent party. (Tr., pages 89, 90.) Also, it is Petitioner's customary practice in all uninsured motorist claims processed by Petitioner in Louisiana and Mississippi always to obtain a Subrogation Receipt and a Release. (Tr. Ex. 5, Dep. Ex. 18.) This practice continues now (*Cf.* Petition of Petitioner, page 3). Respondents submit that Petitioner's customary practice, at least in Louisiana and Mississippi, constituted then, as it does now, a larger pattern of fraud, trickery and deceit where lay persons who are insured by Petitioner may execute unknowingly Petitioner's Subrogation Receipt assigning to Petitioner their rights against tortfeasors, thereby relinquishing forever their right to be made whole by full recovery of all damages due them. As TXO knew Alliance had good title to the oil and gas rights, certainly Petitioner knew under the terms of its own policy through the Uninsured Motorist Coverage Amendment-Louisiana that it had no legal right to seek subrogation until its insured, the minor Tina Strickland, had recovered all obtainable damages due her. The only winner in Valley

Forge's scheme would be Valley Forge, who, if successful, would recover all, or at least part, of what it had contracted to pay its own insureds, to the detriment of its insureds. Valley Forge intended to profit by its unconscionable scheme; the trial court recognized this and awarded punitive damages to remove that desirability and to have Valley Forge sustain a loss in the same manner as this Court approved subsequently in *Haslip*.

The wealth of Petitioner was considered by both the trial and appellate courts of Mississippi who found the punitive damages award reasonable and, as the Mississippi Supreme Court said, lower than in other similar cases. As in *TXO*, the punitive damages award was not so grossly excessive as to be beyond the power of the State to allow.

The initial amount in controversy in Valley Forge's action for a declaratory judgment, $25,000, the policy limits of another tortfeasor's insurance, may not seem to some a lot of money; but to a brain-damaged child it equates, at least proportionately, to the potential loss Alliance would have suffered. As this Court said:

> It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

TXO, 113 S.Ct. at page 2721-2722. This rationale was unquestionably the reason for the punitive damages award by the trial court and the finding by the Mississippi Supreme Court that Petitioner's conduct was sufficiently egregious to justify punitive damages.

As this Court noted,

> [W]e do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. . . . Furthermore, the fact that our cases have recognized for almost a century that the Due Process

> Clause of the Fourteenth Amendment imposes an outer limit on such an award does not, of course, make that clause "the secret repository of all sorts of other, unenumerated, substanitve rights,"

TXO, 113 S.Ct. at page 2720, n.24.

The case *sub judice* is distingiushable from this Court's criticism of the trial judge in *TXO*. In the case *sub judice* the trial judge wrote a sixteen page Judgment and Opinion clearly articulating his reasoning in the punitive damages award. The unconditional punitive damages award was unanimously approved by the appellate court.

As this Court concluded in *TXO*,

> In any event, the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct. *Haslip*, 499 U.S., at 24, n. 12, 111 S.Ct., at 1046, n. 12.

TXO, 113 S.Ct. at page 2724. Petitioner had notice of the potential for a punitive damages award even before it consulted its Mississippi trial counsel and positively before litigation ensued because it knew that under the terms of its own policy through the Uninsured Motorist Coverage Amendment-Louisiana that it had no legal right to seek subrogation. Petitioner's representative had testified at the Rule 30(b)(6) deposition of Petitioner that the "policy" there produced was a sample and trial counsel for Petitioner said that a certified copy of the policy that would have issued was on the way. (Tr. Ex. 5, dep., p. 16, 18.) Undoubtedly, Petitioner was aware of Respondents' counterclaim which demanded a punitive damages award. Petitioner had more than ample notice.

As Mr. Justice Kennedy said in *TXO*:

> As I have suggested before, see id., at 41, 111 S.Ct., at 1054 (KENNEDY, J., concurring in judgment), a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so.

TXO, 113 S.Ct. at page 2725 (Kennedy, J., concurring). The reasons, as above indicated, for the punitive damages award in this litigation are legion. Without again reciting those, Respondents submit that the trial court exhibited a logical and rational concern for deterrence and retribution in that award and that therefore, the Due Process Clause and the Constitution, as a whole, were not violated. As in *TXO*, the record here clearly supports that Petitioner knowingly acted with specific intent to recover monies to which it was not entitled. That is malice. The trial court's decision to assess punitive damages at $1,000,000 was more than justified and was done within sufficiently definite and meaningful constraints to satisfy the Due Process Clause.

It was rational for the trial court to place great weight on the evidence of Petitioner's deliberate, wrongful conduct in determining that an assessment of punitive damages was required in order to serve the goals of punishment and deterrence. The record of this case, when viewed as a whole, makes it abundantly clear that the trial court's decision was motivated by a legitimate concern for punishing and deterring Petitioner, rather than by bias, passion or prejudice. There was ample evidence of willful and malicious conduct by Petitioner in this case. See *TXO*, 113 S.Ct. at page 2726 (Kennedy, J., concurring).

Mr. Justice Scalia predicted in his concurring opinion in *TXO* the "spawn[ing] [of] wasteful litigation." *TXO*, 113 S.Ct. at page 2728 (Scalia, J., concurring). Respondents admit that neither the trial court (at the time of the trial *Haslip* had not been decided) nor the Mississippi Supreme Court specifically made reference in their opinions to this Court's decisions. Nevertheless, an examination of the Mississippi court's decision suggests that due consideration was given the very concerns this Court voiced in both *Haslip* and *TXO*. Valley Forge's Petition is wasteful litigation because there are no true Constitutional issues that remain.

The trial court and the Mississippi Supreme Court applied sufficiently definite and meaningful constraints to satisfy the Due Process Clause in awarding and affirming the punitive damages in this litigation.

Question 2.

The other question Petitioner raises is, in Petitioner's view, whether the punitive damages award was so excessive and arbitrary as to violate Petitioner's substantive due process rights.

Respondents begin this response with the comment of the Court previously noted herein:

> [W]e do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. . . . Furthermore, the fact that our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award does not, of course, make that clause "the secret repository of all sorts of other, unenumerated, substantive rights,"

TXO, 113 S.Ct. at page 2720, n.24.

Also, Mr. Justice Scalia, joined by Mr. Justice Thomas, in *TXO* said:

> I do not, however, join the plurality opinion, since it makes explicit what was implicit in *Haslip*: the existence of a so-called "substantive due process" right that punitive damages be reasonable, see ante, at 2720. [Footnote omitted.] I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights —however fashionable that proposition may have been (even as to economic rights of the sort involved

> here) at the time of the Lochner-era cases the plurality relies upon, see ante, at 2731-2732. It is particularly difficult to imagine that "due process" contains the substantive right not to be subjected to excessive punitive damages, since if it contains that it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

TXO, 113 S.Ct. at pages 2726-2727 (Scalia, J., concurring). Also,

> Today's reprise of *Haslip*, despite the widely divergent opinions it has produced, has not been a waste. The procedures approved here, ante, at 2723-2724 (plurality opinion), are far less detailed and restrictive than those upheld in *Haslip*, supra, at 19-23, 111 S.Ct., at ——, suggesting that if the Court ever does invent new procedural requirements, they will not deviate significantly from the traditional ones that ought to govern. And the disposition of the "substantive due process" claim demonstrates that the Court's " 'constitutional sensibilities' " are far more resistant to " 'jar [ring],' " ante, at 2722 (plurality opinion) (quoting *Haslip*, supra, at 18, 111 S.Ct., at 1043), than one might have imagined after *Haslip*.

TXO, 113 S.Ct. at page 2727 (Scalia, J., concurring).

As the Court said in *Haslip*, and reiterated in *TXO*,

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.

Haslip, 111 S. Ct. at 1043 (*Cf. TXO*, 113 S.Ct. at page 2720.) The Fifth Circuit in its review of *Eichenseer* rightfully offered no such suggestion when it said:

> In essence, the Court in *Haslip* reasoned that the constitutionality of an award of punitive damages

> is a function of two practical considerations: (1) whether the circumstances of the case indicate that the award is reasonable, and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the factfinder.

Eichenseer, 934 F.2d at 1381. The Fifth Circuit interpreted this Court's decision and said:

> In particular, the Court identified a couple of facts that supported the amount of the award in *Haslip*: (1) the conduct in question was reprehensible, and (2) society has a significant interest in discouraging insurers from similar conduct. Id. These facts sufficiently indicated that the punitive damages award in *Haslip* was reasonable.

Eichenseer, 934 F.2d at 1381. In *Eichenseer*, the Fifth Circuit found that those factors existed. The punitive damages award of $500,000, despite the actual damages award of only $1000 (the insurance company having paid pre-trial the $6658.35 in medical expenses), was not so excessive and arbitrary as to violate Petitioner's substantive due process rights, despite the fact that the punitive award in *Eichenseer* was more than 65 times the sum of the actual damages award and the $6658.35 in medical expenses paid pre-trial and more than 500 times the actual damages award.[10]

In the Fifth Circuit's review of *Eichenseer*, as to the question of excessiveness under Mississippi law, the court there said:

> Thus, after *Haslip*, an award of punitive damages is constitutional if the circumstances of the case indicate that the award is reasonable and the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the

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[10] For purposes of comparison, in the instant case the punitive award is 12.5 times the actual daamge award, excluding court-awarded attorneys' fees and expenses.

> discretion of the factfinder. This is a fact intensive analysis. On appellate review of a punitive damages award, a court must carefully consider the nature of the wrong and the status of the parties. The touchstone of constitutionality under *Haslip* is not the amount of the award in the abstract. The size of an award of punitive damages and the relationship between the award and the amount of compensatory damages are relevant factors in determining whether the award is constitutional, but these factors are not dispositive.

Eichenseer, 934 F.2d at 1381-1382. Also,

> Under *Haslip*, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable. This condition, contrary to the assertion of Reserve Life, is not a vehicle for expansive appellate review of punitive damages awards. It creates, instead, a narrow channel for appellate review in which the focus of a reviewing court is to ensure that, under the circumstances of the case in question, the award of punitive damages is not grossly excessive or unreasonable.

Eichenseer, 934 F.2d at 1382. Thereafter, as a footnote, the Fifth Circuit reviewed prior pronouncements of this Court and said:

> The Due Process Clause does not prohibit large damage awards—or even susbtantial damage awards. Rather, the Due Process Clause forbids damage awards that are "grossly excessive," *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111, 29 S.Ct. 220, 227, 53 L.Ed. 417 (1909), or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919).

Eichenseer, 934 F.2d at 1382, n.6. In speaking to the amount of a punitive damages award, the court found that

the trier of fact was best suited to determine the amount of a punitive damages award because it had received the evidence and best knew the facts peculiar to that particular case. The court then said:

> Accordingly, in reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. [Footnote omitted.] Rather, the court may only consider whether the circumstances of the case offer some support for the amount of the award. *If there are any circumstances of probative force that support the amount of the award, then the award meets the "reasonableness" prong of the due process test in Haslip.*

Eichenseer, 934 F.2d at 1382. (Emphasis, Respondents'.) Petitioner maintains through a footnote, using a phrase taken totally out of context, that the Mississippi Supreme Court found Petitioner was not "sufficiently culpable to justify punitive damages." This assertion is so misleading as to stretch the bounds of advocacy. The entirety of the sentence from which that phrase was lifted explains clearly that it deals only with the "conditional" second $1,000,000 punitive damages award, which the Mississippi Supreme Court reversed and rendered.[11]

The Fifth Circuit concluded that the punitive damages award in *Eichenseer* was supported by the record; that the conduct of the insurance company there was particularly egregious and done in reckless disregard of its insured. In the case *sub judice*, the Mississippi Supreme Court found in discussing the alleged excessiveness:

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[11] Furthermore, *we do not consider the conduct related to the settlement in Louisiana sufficiently culpable to justify punitive damages.* For the foregoing reasons, *we reverse the award of the second million dollars* as well as the alternative affirmative measures. (*Strickland*, 620 So.2d at 541, Appendix A, pages 12a-13a, Petition of Petitioner.) (Emphasis, Respondents'.)

> The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases. See e.g., *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss.1990) (5¼ percent of net worth affirmed). *Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries*, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias, or prejudice on the part of the chancellor. Accordingly, this assignment of error is without merit.

Strickland, 620 So.2d at 541, Appendix A, pages 11a, Petition of Petitioner. (Emphasis, Respondents'.) The egregiousness comes specifically from the trial court's finding of fact that by the express terms of its own policy "Valley Forge has *no subrogation right*." (Emphasis, the trial court's.) Appendix B, page 20a, Petition of Petitioner. Petitioner, well knowing by its contract and applicable law, that it had no right of subrogation, in absolute defiance of both, instituted its complaint for the right to take as its profit the monies to which the minor was lawfully entitled. If the Fifth Circuit *Eichenseer* court was correct in finding that the conduct there, though egregious, was done with reckless disregard, then the trial court in Strickland, the Mississippi Supreme Court and this Court are more than justified by both law and fact in affirming the unconditional punitive damages award of $1,000,000; and, if in this Court's power, restoring to the minor the "conditional" second $1,000,000 punitive damages award, which the Mississippi Supreme Court reversed and rendered.

As the Fifth Circuit *Eichenseer* court concluded:

> Reserve Life's cavalier handling of Eichenseer's claim is *an unfortunate example of an insurer's desire to save money at the expense of its insureds*. A mere slap on the wrist is inadequate to punish such con-

> duct. Thus, the egregious nature of Reserve Life's conduct is a significant factor that supports the $500,000 award of punitive damages to Eichenseer.
> . . .
>
> The court's consideration of the deterrent effect of its award was proper. One of the fundamental purposes of punitive damages is to deter a wrongdoer from future misconduct. While the Due Process Clause requires that punitive damages not be grossly excessive, it does not require that punitive damages be ineffectual and impotent.

Eichenseer, 934 F.2d at 1383-1384. (Emphasis, Respondents'.) Respondents respectfully suggest Petitioner's motive was not saving money but, in effect, what common folk such as the author of this brief would call stealing money. Petitioner was not entitled to it, it was not Petitioner's; Petitioner, for profit, just wanted to capture it.

In *Haslip*, this Court approved the Alabama post-trial review procedures for scrutinizing punitive damages awards. Those procedures are:

> . . . [T]rial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." Id., at 1379. Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." *Ibid. The Hammond test ensures meaningful and adequate review by the trial court* whenever a jury has fixed the punitive damages.

Haslip, 111 S.Ct. at 1044. (Emphasis, Respondents'.) A review of the trial court's Judgment and Opinion shows that Petitioner received more than a meaningful and adequate review. The review by the appellate court complied with the *Haslip* approved standards by a com-

parative analysis, by ensuring that the award did not exceed an amount sufficient to accomplish Mississippi's goals of punishment and deterrence and that this appellate review made certain that the punitive damages were reasonable in their amount and rational in light of their purposes of punishing what occurred and deterring its repetition.

In view of the established facts, and after a thorough review by both the trial court and the Mississippi Supreme Court, the punitive damages award was not so excessive and arbitrary as to violate Petitioner's substantive due process rights. Respondents suggest that, under all applicable standards, a larger punitive damages judgment would have likewise been found not to be excessive, given the conduct of Valley Forge which led a careful and deliberate trial judge to render a judgment designed to meet Mississippi's legitimate goals of punishment and deterrence.

CONCLUSION

The petition addresses form and not substance. The chief complaint of Petitioner is that both the trial court and the Mississippi Supreme Court failed to refer specifically to *Haslip*, *TXO* and *Eichenseer* in their respective opinions. Obviously, the trial court could not because those cases had not been decided at the time of its Judgment and Opinion, June 26, 1990. The Mississippi Supreme Court's reference to *Ivy* in which it had reviewed Mississippi's procedures in *Haslip*'s light, was tantamount to citing *Haslip*. There it found that in *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d at pages 1182-1192, it had explained that a Mississippi judge or jury's discretion is limited or confined, that it had defined the nature and purpose of punitive damages, and that it, the Mississippi Supreme Court, did provide a substantive and comparative check on the amount which the jury awarded a plaintiff.

Mississippi, though perhaps not in form pleasing to Petitioner, but in substance, has addressed in a constitutionally sound manner each requirement of this Court's decisions in *Haslip* and *TXO*. Those requirements are in effect and were so before *Haslip* and were actually applied here with the Mississippi Supreme Court's reversing and rendering the trial court's award of the second $1,000,000.

Respectfully, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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